THE NORTH CAROLINA STATE BAR

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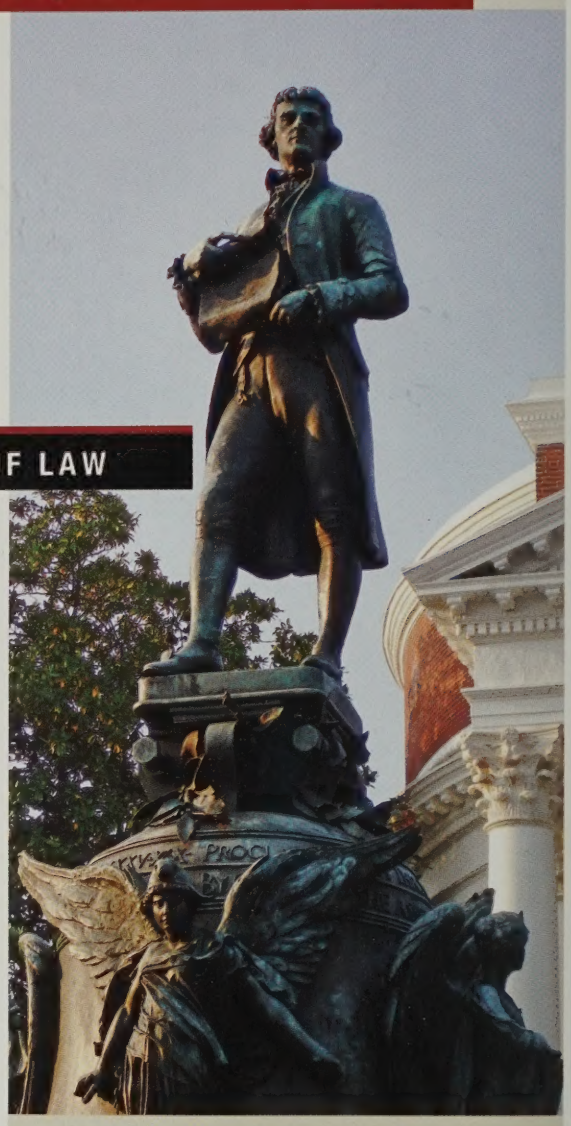

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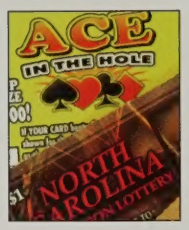

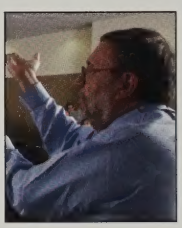

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Cover photo courtesy of Mike Dayton.

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SUNTRUST
Seeing beyond money

Against All Odds

By Mike Dayton

North Carolina finally has a lottery. Now's your chance to hit it big—not by actually playing the games, where your prospects of striking it rich are, statistically speaking, lower than a possum's belly. No, the real money is in the original "jackpot litigation"—those lawsuits filed on behalf of the family members and disgruntled co-workers who claim they're entitled to a piece of the lottery pie. When those clients walk through your office door, will you be ready? These cases from other states offer a glimpse at your chances of success.

To Have and to Hold

If your client claims to have the winning ticket, it never hurts to get a look at it. The reason: lottery officials tend to draw the purse strings tight when someone can't produce that piece of paper.

Take the case of Orrin J. Fowles, who alleged he purchased a winning $117,037 ticket for the Kansas Cash Lotto drawing on July 20, 1988. Mr. Fowles said he bought a $1 ticket at the Short Stop Convenience Store in Clay where his daughter, Pennie Cranmer, was a clerk. Mr. Fowles asked Pennie to hold on to his ticket because he was going out of town. Pennie said she wrote her father's name on the ticket and placed it in a basket under the counter. Somehow, the ticket disappeared and was never located. Lottery officials confirmed that the only winning ticket was purchased at the Clay store, and no one else ever stepped forward to claim the prize. Although Mr. Fowles and his daughter signed sworn affidavits about the purchase, lottery officials refused to pay.

Mr. Fowles sued. The outcome: on top of losing the ticket, Mr. Fowles also lost his legal challenge. In *Fowles v. State of Kansas*, 254 Kan. 557, 867 P.2d 357 (1994), the Kansas court stated "that to be a 'holder' of a winning lottery ticket and to have a right to collect the winnings, one must have possession of the ticket."

Wild "Wild Card"

With thousands or millions of dollars at stake, it's no surprise that wannabe winners will test the outer limits of logic. Consider the Maine contestant, Larry Moody, who bought a scratch-off ticket called "Wild Card Cash." Contestants scratched off six hand-shaped areas on the game card to reveal two boxes with numbers or letters. If numbers or letters matched, the ticket was a winner. The card also contained a separate scratch-off box labeled "wild card." The card was a winner if the wild card number matched any of the other boxes.

None of the box pairs on Moody's card matched. Nor did Moody's wild card number—5—match numbers or letters under any of the hands. That did not stop him from pressing a lawsuit that claimed he was a winner. In *Moody v. State Liquor & Lottery Commission*, 843 A.2d 43 (2004), he argued that the common definition of a wild card permitted him to disregard the wild card number actually printed on his card and choose a number more to his liking—for instance, 4 or 6, which would turn him into a $20,000 winner.

Not so fast, the Maine Supreme Judicial Court said, in shooting down that argument as frivolous. "Moody's interpretation would make *every* Wild Card Cash ticket a winning ticket," the court said.

Proof of Winning Numbers

Occasionally, lottery fights hinge on who actually owns the ticket. To prevail in that dispute, sometimes you need look no farther than your client's ID card. In *Sau Thi Ma v. Xuan T. Lien*, 260 A.D.2d 258 (1999), the parties both claimed to be the true owner of $3.6 million in lottery proceeds. The deciding proof at trial came from an unlikely source—the winning lottery numbers were apparently derived from the Medicaid card of the plaintiff's mother, according to the opinion.

Seeing Red

In *Georgia Lottery Corporation v. Sumner*, 529 S.E.2d 925 (2000), a scratch off lottery ticket promised a perpetual payday: "$50 A DAY FOR FIVE YEARS!" The winning card had a symbol that contained a black circle with a white center and a smaller black circle in its middle. A player thought he'd won because his ticket had a similar symbol. One big difference: his winning symbol was red. When lottery officials refused to pay, he sued for breach of contract. The problem: "The evidence in the record shows clearly the red circle on Sumner's ticket that resembles the winning symbol was a stray printing mark, known in the trade as a 'hickey,'" the court said. Under that state's rules, that made the ticket "irregular" and thus void.

A Dream Deferred?

Clients who play the blame game in their lottery lawsuits are likely to slip and fall flat on their faces, especially when they pin their woes on the convenience store that sold them the ticket. In *Brown v. California State Lottery Commission*, 232 Cal.App.3d 1335 (1991), a lottery player claimed he'd have won $7.25 million but for the fact that his local 7-Eleven retailer had a malfunctioning machine that would not allow him to pick his own

The California Court of Appeal had a decided lack of sympathy for the fellow's breach of contract claim, stating: "Had he not waited till the last possible instant to make his down payment on a dream, [he] might have reaped more than just a crapshoot in the courts." Ouch!

numbers. The player said he did not have time to go to a nearby store before the drawing.

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The court also ruled the store owed no legal duty to the plaintiff and said it would not "hold any establishment to answer for the procrastination of fortune seekers." According to the opinion, "The odds of winning the lottery are extraordinarily slight, to say the least; the chances of picking the correct numbers are far less than one in a million.... No store would participate in the California Lottery if to do so opened the door to crushing liability every time a machine was inoperative, malfunctioned, or an employee was too busy to attend to the needs of fortune seekers."

Late to the Game

The case of *Driscoll v. State of New Jersey*, 627 A.2d 1167 (1993), arose when the New Jersey state lottery changed its drawing time for its "Pick Six" game from 9:56 p.m. to 7:56 p.m. The switch occurred on October 1, 1990.

The lottery commission notified the general public by several means and supplied posters for display at each retailer. As bad luck would have it, a Rite-Aid pharmacy that Florence Driscoll patronized discarded its poster without ever displaying it.

Ms. Driscoll testified that she purchased her tickets at around 8:00 p.m. on October 1. She said she believed they were for that evening's game.

"As it turned out, one of the chances the plaintiff had purchased was for the combination of numbers 6, 11, 13, 22, 26, 45. These numbers were the winning numbers for the October 1, 1990, drawing!" the opinion exclaimed.

When Ms. Driscoll went to validate her ticket, she learned it was dated for the October 4, 1990, drawing. She pressed negligence and breach of contract claims against the state and also named the retailer for failing to put up the time-change poster. The Superior Court of New Jersey was not persuaded, finding Ms. Driscoll had ample time and opportunity to learn about the switched draw time, stating this public policy, "Where one willingly elects to participate in the lottery scheme, the burden must be placed upon the fortune-seekers to become informed of the rules that govern the outcome of the game, including the time and dates of the drawing, or suffer the consequences for failing to keep him or herself apprised."

The court added: "Recognizing a viable cause of action in this case would open the door to deceptive practices by fortune-seekers hoping to beat the odds in the lottery game."

Winner Takes...Half?

In *Fullerton v. Department of Revenue Services,* 714 A.2d 1203 (1998), James and Mary Fullerton purchased one of two winning numbers for a December 21, 1993, Lotto drawing in Connecticut. The cash prize for that drawing was $5,618,438.86. Two winning tickets were sold, meaning each winning share was valued at $2,809,219.43, payable in 20 annual installments of $94,809.97. When the other winning ticket went unclaimed, the plaintiffs argued that portion should also be paid to them. Their reasoning: in order to be a winner, one must not only hold a winning ticket, but also present it to the claims center. The court sided with lottery officials and held that "winners are conclusively determined at the time of the drawing, not at the time of the presentment of the ticket."

Pool Parties

Don't forget a simple maxim from your first year of law school: contracts can be oral. That legal concept carried the day in *Stepp v. Freeman*, 694 N.E.2d 510 (1997), when 20 co-workers agreed to pool their resources and purchase lottery tickets as a group anytime the jackpot reached $8 million. Membership in the pool was limited to 20 persons and had a waiting list. There was an understanding about how much each person would contribute, and the pool organizer allowed members to stay in even when they occasionally neglected to make their required $2.20 contribution toward 40 tickets and four "kickers."

A dispute arose when the pool organizer, Freeman, and one of its members, Stepp, had "a serious work-related disagreement" that included some name-calling, according to the *Stepp* opinion. After the argument, Freeman unilaterally booted Stepp out of the pool even though he'd been a member for five years.

Lady Luck showed up the very next week when the group hit the $8 million jackpot. Although Stepp had not contributed toward the winning ticket, he argued he was entitled to a share of the loot, and he sued when the pool members refused to pay him. The Ohio Court of Appeals ruled in his favor, finding an implied contract had been created. The court said Freeman breached that contract when he failed to inform Stepp that the group was playing the lottery.

As you may have gathered, the odds usually favor the house, even in lottery lawsuits. So one final tip: if you decide to take one of these cases, you may want to bill by the hour, rather than on a contingency basis. ■

Mike Dayton is editor of North Carolina Lawyers Weekly *and* South Carolina Lawyers Weekly *and co-author of a book on the history of Wake County lawyers published in 2004.*

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Fourth Annual Fiction Writing Competition

The Publications Committee of the *Journal* is pleased to announce that it will sponsor the Fourth Annual Fiction Writing Competition in accordance with the rules set forth below. The purposes of the competition are to enhance interest in the *Journal*, to encourage writing excellence by members of the bar, and to provide an innovative vehicle for the illustration of the life and work of lawyers. If you have any questions about the contest, please contact Jennifer Duncan, Director of Communications, North Carolina State Bar, 6568 Towles Rd., Wilmington, NC, 28409; ncbar@bellsouth.net; 910.397-0353.

Rules for Annual Fiction Writing Competition

The following rules will govern the writing competition sponsored by the Publications Committee of the *Journal*:

1. The competition is open to any member in good standing of the North Carolina State Bar, except current members of the Publications Committee. Authors may collaborate, but only one submission from each member will be considered.

2. Subject to the following criteria, ***the article may be on any fictional topic and may be in any form*** (humorous, anecdotal, mystery, science fiction, etc.). Among the criteria the committee will consider in judging the articles submitted are: quality of writing; creativity; extent to which the article comports with the established reputation of the *Journal*; and adherence to specified limitations on length and other competition requirements. The committee will not consider any article that, in the sole judgment of the committee, contains matter that is libelous or violates accepted community standards of good taste and decency.

3. All articles submitted to the competition become property of the North Carolina State Bar and, by submitting the article, the author warrants that all persons and events contained in the article are fictitious, that any similarity to actual persons or events is purely coincidental, and that the article has not been previously published.

4. Articles should not be more than 5,000 words in length and should be submitted in an electronic format as either a text document or a Microsoft Word document.

5. Articles will be judged without knowledge of the identity of the author's name. Each submission should include the author's State Bar ID number, placed only on a separate cover sheet along with the name of the story.

6. All submissions must be received in proper form prior to the close of business on May 25, 2007. Submissions received after that date and time will not be considered. Please direct all submissions to: Fiction Writing Competition, Jennifer Duncan, 6568 Towles Rd., Wilmington, NC, 28409; ncbar@bellsouth.net.

7. Depending on the number of submissions, the Publications Committee may elect to solicit outside assistance in reviewing the articles. The final decision, however, will be made by majority vote of the committee. Contestants will be advised of the results of the competition. Honorable mentions may be announced.

8. The winning article, if any, will be published. The committee reserves the right to edit articles and to select no winner and to publish no article from among those submitted if the submissions are deemed by the committee not to be of notable quality.

Deadline is May 25, 2007

Notaries Public—What's the Big Deal?

And the New Chapter 10B of the General Statutes

By Haley Haynes

If you had asked me before I joined the NC Secretary of State's staff about the importance of notaries public to society, I would have answered out of ignorance: "They serve to witness signatures—what's the big deal?" Now I know better. Notaries public are state-appointed officials who play a vitally important role in the deterrence of fraud by requiring that signers of legal documents be positively identified, as well as making sure the signer is signing knowingly and willingly. No technology can take the place of an impartial and unbiased individual identifying another person. In short, the notary is often the first, and sometimes best, line of defense against fraud in this age of increasing identity theft.

Recent enactments by the General Assembly include Session Law 2005-391, creating a new Chapter 10B in the General Statutes, and Session Law 2006-59, which further revises Chapter 10B. These laws serve to provide clear guidance to notaries regarding the standards to which they must conform. Plus, the changes still allow third parties to rely on notarizations for conducting their business even in the event of a technical defect within a notarization.

Additionally, S.L. 2005-391 took the

steps necessary to enable electronic notarization (hereinafter "e-notarization") and electronic recording (hereinafter "e-recording"). As a result, North Carolina is positioned to be the first state to enjoy widespread adoption of both e-notarization and e-recording, further enhancing our financial and business communities' competitive edge in the global economy.

Chapter 10B: The Creation

At the direction of the General Assembly, the Department of the Secretary of State (hereinafter, the "Department") studied Chapter 10A in order to modernize and to improve the laws concerning Notaries Public.[1] Additionally, the Department was directed to study the appropriate method for authorizing e-notarization.[2] The Department undertook the General Assembly's mandate in two parts. First, for the "regular" notary act, in February 2005 the Department published for comment a re-draft of Chapter 10A based upon our extensive experience in commissioning and regulating approximately 168,000 notaries. Secondly, for the e-notary and e-recording portion, Secretary of State Elaine F. Marshall[3] convened an advisory council of stakeholders[4] in order to provide recommendations to her for transmittal to the General Assembly regarding the appropriate mechanism for enabling e-notarization and e-recording.[5]

After numerous meetings and vigorous public policy discussions, the Advisory Council on Uniform Real Property Electronic Recordation Act (hereinafter "URPERA") and E-Notarization provided its recommendations to Secretary Marshall.[6]

The Secretary reported to the General Assembly at the beginning of the 2005 Session.[7] Throughout the 2005 Session, the North Carolina Bar Association's Real Property Section, the North Carolina Bankers' Association, the North Carolina Land Title Association, the North Carolina Register of Deeds' Association, and the Department, as well as a number of other organizations, continued to work on the mutually shared goal of providing an improved regular notary act and enabling e-notarization and e-recording in North Carolina. It was through the significant efforts by the leadership of all of these organizations to reach a common agreement on the text of the entire bill that this goal became reality with the passage of Senate Bill 671. On August 24, 2005, the General Assembly overwhelmingly approved this legislation, creating the new Chapter 10B, Notaries.

After the dust settled from the 2005 Session, concerns were raised about various unintended consequences from the new Chapter 10B. Among those concerns were: whether the repeal of Chapter 10A had any effect on the long-established common law concept of "substantial compliance";[8] whether the Chapter's new acknowledgment forms, which were intended to serve as "universal" forms, confused the issue of legal requirements of a notary's acknowledgment. To their credit, the drafters of the acknowledgments went back to the drawing board to re-work the acknowledgement forms in a fashion that would meet the intended goal of providing easily-used universal acknowledgment forms in North Carolina statutory law. The results of their efforts now exist in the recently-amended Chapter 10B,[9] set to take effect on October 1, 2006. Legislative research staff were instrumental in teasing out and separating within the notary law two equally important concepts: (1) the authority of the Secretary to effectively regulate the conduct of notaries public in order to accomplish the underlying goals of the notary laws,[10] and (2) the ability of third parties to rely on notarizations in the event of technical defects in a notarization. An example of this differentiation within the law can be seen in N.C.G.S. § 10B-37: "Seal Image" which provides that the failure of a notary's seal to conform to statutory requirements is a matter for which a notary may be disciplined but "failure of a notarial seal to comply with the requirements of this section shall not affect the sufficiency, validity, or enforceability of the notarial certificate."[11]

The Final Result

The newly revised Chapter 10B now contains the following:

- An extensive definition listing—some revised and some new for clarification of the statutes;[12]
- Additional requirements for qualification to become a notary, including proof of legal residency in the United States, and the ability to speak, write, and read English;[13]
- Clarification of grounds for denying a notary commission;[14]
- Clarification and enhancement of educational requirements for commissioning of non-attorneys, including six hours of classroom instruction within three months preceding application,[15] passage of a mandatory test with a score of 80% or better for initial and re-appointment applicants (excepting licensed members of the North Carolina Bar and certain other long-time notaries[16]);
- Maximum fee for performing a notarial act increased to $5.00 per signature;[17]
- Clarification of the proper procedure for acknowledging a person's mark and for acknowledging an instrument for a person who is unable to sign or make a

mark;[18]

- Clarification of the requirement that a notary sign by hand in ink (i.e. no facsimile or signature stamps);[19]
- Clarification of grounds or situations in which a notary is prohibited from notarizing an instrument;[20]
- Clarification and simplification of various acknowledgment forms;[21]
- Clarification of process for a notary change of status (i.e. change of name, address, county, and resignation of commission);[22]
- Enhancement of criminal penalties for a variety of notarial offenses, including making a person who knowingly solicits, coerces, or materially influences a notary to perform official misconduct an aider and abettor, therefore subject to the same level of punishment as the notary performing the misconduct;[23]
- Clarification in statutory form that the "presumption of regularity" created by the doctrine of substantial compliance shall apply to all notarial acts, absent evidence of fraud or knowing and deliberate violation of Chapter 10B by the notary;[24]
- Addition of a precautionary curative provision for all notarial acts performed before October 1, 2006.[25]

Practice Tips

There are a few items worth a special mention to all notaries. The first is that, even though the non-exclusive statutory forms provided in the amended N.C.G.S. § 10B-41,[26] 42,[27] 42.1,[28], and 43[29] are quite simple, those forms do not change the notary's role and duties when performing an official act. N.C.G.S. § 10B-40 clearly states that, *regardless of whether it is stated in the certificate*, the notary is certifying to all of the requirements of an official act,[30] including the following by virtue of the now-amended N.C.G.S. § 10B-40(a2),[31] which reads as follows:

> (1) At the time the notarial act was performed and the notarial certificate was signed by the notary, the notary was lawfully commissioned, the notary's commission had neither expired nor been suspended, the notarial act was performed within the geographic limits of the notary's commission, and the notarial act was performed in accordance with the provision of this Chapter.
>
> (2) If the notarial certificate is for an acknowledgment or the administration of an oath or affirmation, the person whose signature was notarized did not appear in the judgment of the notary to be incompetent, lacking in understanding of the nature and consequences of the transaction requiring the notarial act, or acting involuntarily, under duress, or undue influence.
>
> (3) The notary was not prohibited from acting under G.S. 10B 20(c).

Therefore, it is important the notaries remain mindful of their duties and roles regardless of whether or not the certificate they are using specifically recites the required elements.

The second practice tip is that the forms for various certificates provided in Sections 18, 19, 20, 21, and 22 of S.L. 2006-59 are *non-exclusive* and are meant to supplement, not replace, those that are already prescribed by other state laws. Section 18 of S.L. 2006-59 specifically states that notarial certificates are sufficient and shall be accepted if they are substantially in the form set out in Chapter 10B[32] *or* if they are substantially in a form otherwise prescribed by the laws of this State.[33]

My final practice tip to all attorney/notaries out there: consider taking a notary public course offered through your local community college. Due to licensure by the NC State Bar, we are exempted from taking such a course before becoming commissioned as a notary. However, taking one of these classes will serve to give you training in an area of law that many of us only come into contact with incidentally or indirectly. We have had attorneys tell us that taking the notary course was one of the most useful courses they had taken to improve their understanding of an everyday part of their practice.

E-Notaries: The Next Generation

I would be remiss if I did not take this opportunity to inform my colleagues about the exciting developments surrounding e-notarization in North Carolina. The Department is currently engaged in the rule-making process[34] to enable e-notarization to move forward in this state. Once the rules become effective[35] (January 1, 2007, is the proposed effective date), North Carolina will be the first state in the nation to have enabled a method for a variety of e-notary solutions to be approved and deployed. Because this law has been approached in terms of the standards that should govern the technology, the standards themselves are technology neutral. The added benefit is that we are setting the baseline for what is required without prescribing any specific technologies, as other states have chosen to do; therefore, future developments and improvements in technology may be enabled without further rule-making or legislative action.

You may be asking yourself what is meant by "electronic notary"—does this change a notary's duties? Is personal appearance required in the e-notary world? The short answers are: no, the duties of a notary are the same, regardless if they are working on paper with their seal in hand or on a computer and accessing their electronic seal and signature; and yes, personal appearance[36] and all of the other bases for a notary acting in their official capacity are still required when an e-notary performs an official electronic notary act.

First, the basics: only already-commissioned notaries are eligible to become e-notaries;[37] they must also complete three additional hours of training in notarial laws, procedures, technology, and ethics and pass a test on these topics[38] before they are authorized to perform electronic notarizations. There are additional registration requirements along with a $50.00 registration fee;[39] the term of registration coincides with the regular notary commission.[40]

Next, the concept: electronic notaries will be using new tools (i.e. their electronic seal and signature) to perform their duties in an electronic setting. The Department is responsible for adopting rules to "insure the integrity, security, and authenticity of electronic notarizations."[41] The Department has proposed rules that set standards by which technologies are to be measured. If an e-notary solution measures up to the standards set by the rules, then that solution becomes an authorized method of performing e-notarizations. This allows notaries who wish to become e-notaries to do so easily and without having

to learn the ins and outs of different technologies in order to know which method to choose. Instead, e-notaries will be able to choose from the list of approved vendors who have been found to have met the rules' standards in order to move into the electronic arena.

A Final Word

Secretary Marshall believes in giving the public prompt and useful service, and everyone in the Department strives to meet that goal every day. If you have questions about this article or other matters relating to notaries, please feel free to contact me directly at (919)807-2005 or by e-mail: hmontgomery@sosnc.com. Director Gayle Holder, former Harnett County Register of Deeds, is also available for your questions. You may reach her at (919)807-2288 or at gholder@sosnc.com. Further detailed information about the e-notary program development can be obtained from Ozie Stallworth, E-Notary Analyst/Director, at (919)807-2295 or ostallworth@sosnc.com. ■

Haley Haynes currently serves as deputy secretary of state. She oversees several major divisions of the Secretary of State's Office, including its corporations, trademarks, notary public, and Uniform Commercial Code sections. Haynes served as the department's general counsel since 2002 before being promoted to deputy secretary in June 2004. Haynes worked as a private attorney in Asheville prior to joining the department. She is also a former public defender in both Asheville and Fayetteville.

Endnotes

1. Section 6.2, Session Law 2004-161.
2. *Id.*
3. Secretary of State Elaine F. Marshall is presently serving her 3rd consecutive term as secretary of state, having first been elected in 1996 and re-elected in 2000 and 2004.
4. Represented on the Advisory Council were the following organizations: NC State Bar, NC Property Mappers Association, NC Land Title Association, NC Association of the Register of Deeds, NC Association of Assessing Officers, NC Association of County Commissioners, NC Bar Association, NC Notary Association, NC Society of Surveyors, NC Department of Cultural Resources, NC Department of Transportation.
5. *See* Secretary of State Directive 2-04, The Secretary of State's Advisory Council on the Uniform Real Property Electronic Recordation Act
6. *See* Report to the North Carolina Secretary of State on North Carolina Electronic Recordation and Notarization by the Secretary of State's Advisory Council on the Uniform Real Property Electronic Recordation Act, February 10, 2005.
7. *See* Report on Modernization and Simplification of Notary Public Laws and E-Notarization, March 16, 2005.
8. *See Freeman v. Morrison*, 214 N.C. 240 (1938), in which the NC Supreme Court established a "substantial compliance" standard for evaluating whether an acknowledgment complies with statutory requirements. In that case, the Court reasoned that, absent evidence to the contrary, a "presumption of regularity" applied to the acts of public officers, particularly judicial acts, and then cited a case stating that taking an acknowledgement qualified as a judicial or quasi-judicial act. The Court then cited several secondary authorities supporting its holding, including this quotation from American Jurisprudence, "Probably in all jurisdictions the courts strongly advocate a liberal interpretation of the statutes, in order that acknowledgements may be upheld wherever there has been a substantial compliance with the law and no suspicion of fraud or unfairness attaches to the transaction." As of the writing of this article, *Freeman* has not been overruled. Cases citing and approving the *Freeman* holding include *Lawson v. Lawson*, 321 N.C. 274 (1987), *Contract Steel Sales, Inc. v. Freedom Const. Co.*, 321 N.C. 215 (1987), and *Matter of Hess*, 104 N.C. App. 75 (1991).
9. *See* Sections 18-22, Session Law 2006-59.
10. *See* N.C.G.S. § 10B-2, which give six underlying purposes, including:
    (1) To promote, serve, and protect the public interests.
    (2) To simplify, clarify, and modernize the law governing notaries.
    (3) To prevent fraud and forgery.
    (4) To foster ethical conduct among notaries.
    (5) To enhance interstate recognition of notarial acts.
    (6) To integrate procedures for traditional paper and electronic notarial acts.
11. *See* N.C.G.S. § 10B-37(f).
12. *See* N.C.G.S. § 10B-3.
13. *See* N.C.G.S. § 10B-5(b).
14. *See* N.C.G.S. § 10B-5(d)
15. *See* N.C.G.S. § 10B-8(a)
16. *See* N.C.G.S. § 10B-11(b)(3) as amended by S.L. 2006-59, providing that the testing requirement does not apply to notaries who have been continuously commissioned since July 10, 1991, who have never been disciplined as a notary.
17. *See* N.C.G.S. § 10B-31.
18. *See* N.C.G.S. § 10B-20(d) & (e).
19. *See* N.C.G.S. § 10B-35 as amended by S.L. 2006-59.
20. *See* N.C.G.S. § 10B-20(c) as amended by S.L. 2006-59.
21. *See* N.C.G.S. § 10B-40, 41, 42, 42.1 & 43 as amended by S.L. 2006-59.
22. *See* N.C.G.S. § 10B-50 through 55.
23. *See* N.C.G.S. § 10B-60.
24. *See* N.C.G.S. § 10B-99(a) as enacted by S.L. 2006-59.
25. *See* N.C.G.S. § 10B-99(b) as enacted by S.L. 2006-59.
26. *See* Sec. 19 of S.L. 2006-59.
27. *See* Sec. 20 of S.L. 2006-59.
28. *See* Sec. 21 of S.L. 2006-59.
29. *See* Sec. 22 of S.L. 2006-59.
30. *See* Section 1 of S.L. 2006-59 as follows: N.C.G.S. § 10B-3(1) for acknowledgements, N.C.G.S. § 10B-3(2) for affirmations, N.C.G.S. § 10B-3(14) for oaths, N.C.G.S. § 10B-3(28) for verifications or proofs.
31. *See* Section 18 of S.L. 2006-59.
32. *See* Section 18 of S.L. 2006-59, G.S. § 10B-40(b), (c), (c1) and (d).
33. *Id.*
34. The public comment period on the proposed rules for Chapter 10B ends October 31, 2006.
35. Go to http://www.oah.state.nc.us/rules/register/ register.html and click on Issue 5 of Volume 21 for the full text of the rules in their proposed form for both regular and electronic notaries.
36. *See* N.C.G.S. § 10B-116.
37. *See* N.C.G.S. § 10B-105.
38. *See* N.C.G.S. § 10B-107.
39. *See* N.C.G.S. § 10B-106 and 108.
40. *See* N.C.G.S. § 10B-106(b).
41. *See* N.C.G.S. § 10B-126(d).

2007 Meeting Schedule

Below are the 2007 dates of the quarterly State Bar Council meetings.

January 16 - 19	Sheraton Capital Center, Raleigh
April 17 - 20	Sheraton Capital Center, Raleigh
July 10-13	Sheraton Atlantic Beach
October 16 -19	Sheraton Capital Center, Raleigh
	(Election of officers October 18, 11:45 am)

Creating a National Model for Legal Education at Elon—and Why

By Leary Davis

There was a man from our town,
And he was wondrous wise.
He jumped into a bramble bush
And scratched out both his eyes.

When he saw that he was blind
With all his might and main,
He jumped back in the bramble bush
And scratched them in again.

Karl Llewellyn, The Bramble Bush

Elon Law School Professor Don Peters teaches in one of the school's high-tech classrooms.

On August 10, 2006, in Greensboro, Elon University School of Law enrolled a charter class of 115 students. They came from 12 states and 49 different colleges and universities, including those from the Piedmont Triad, North Carolina's major state universities, and such other schools as Duke, Davidson, UVA, UCLA, Harvard, and Yale. Their median LSAT and GPA were remarkable for the entering class of an unapproved law school.

They may be the first class to enter a new American law school with a building capable of housing and supporting the school not only in its first year of operation, but also for all three years of instruction. When Justice Sandra Day O'Connor dedicated Elon University School of Law on September 19, she praised the school's H. Michael Weaver Building, which also houses the North Carolina Business Court, telling the students they could not imagine how fortunate they are to be able to study in such a fine, technologically advanced facility.

Elon's law library encompasses the bottom two floors of the Weaver Building, where it provides seating for over 300 patrons. It already offers access to 150,000 volumes for its students, faculty, and the practicing bar.

As impressive as Elon's facilities and downtown Greensboro location are, it was primarily Elon's faculty members and the educational program they are constructing that attracted the school's charter class. Elon's School of Law is building on the strengths of its parent university, designated America's "hottest college" for student engagement by *Newsweek-Kaplan*, in creating a national model for engaged learning in legal education.

The Bramble Bush

I want to use this article to describe distinctive aspects of that model, but first to tell why it is needed. Karl Llewellyn's *Bramble Bush* poem quoted above provides a good place to start. If I understand the poem correctly, it is a metaphorical statement of the traditional advice given first-year law students: "We don't know exactly how one comes to think like a lawyer, but... trust us. Work hard. You'll feel blind. Keep working hard. Then you'll see."

One can argue that this advice has worked well for better than a century, since the advent of the case method at Harvard. After all, we're good lawyers, achieving at high levels, helping clients solve problems and maximize opportunities in broad ranges of situations. Law school must work well.

But has it worked as well as it should? When we read state of the profession surveys, we sense that it might not have worked as well as it could, and should, for the 20% or more of lawyers who find themselves feeling neutral or dissatisfied about their careers. I suspect it also does not work as well as it could, and should, for the rest of us, who express satisfaction with our careers.

None of us achieve our full potential. What if our three years of law school had provided us with broader and more substantial foundations upon which to construct our careers? At what higher levels of effectiveness might we have constructed our law practices and our lives? And if all, or even most, of us were functioning at those levels, how much better might the justice system and our families, firms, communities, nation, and world be?

We are going to need lawyers who function at those levels in the future. Those lawyers will need to be capable of making more high quality events happen for more clients in less time if they are to meet the demand for legal services in the United States and to respond to international competition in a global marketplace (see sidebar). They must be problem solvers who know more, think better, are more skilled, understand and use technology better, possess greater global and multi-cultural awareness, and build and participate on better teams.

State and National Demand

From 1970 to 2000, the number of lawyers in the United States increased from 326,000 to 1,086,000, more than tripling while total population increased by only 37%. Despite this growth, the United States soon might not have enough lawyers to meet the domestic demand for legal services unless we change the way we practice law. To maintain our current ratio of lawyers to our projected population, we will need 1,591,000 lawyers by 2030. Because we will have 400,000 lawyers retiring in the next 10 to 15 years, it might be difficult to maintain that ratio.

A better indicator of the need for lawyers is the ratio of lawyers to projected gross domestic product. To maintain our current ratio of about $9.5 million per lawyer, we would need a total of around 2.5 million lawyers by 2030. It is debatable that having that many lawyers in the United States would be a good thing. A good thing or not, it is unlikely to happen. In the absence of a large increase in law school enrollments and graduations, lawyer population is projected to grow at less that one-third the rate of the economy. These pressures may be felt most keenly in North Carolina, which has fewer lawyers per capita than any other state in the nation except South Carolina, and which trails only Nevada and Delaware in gross state product per lawyer. US clients may have to look overseas to find lawyers to help them facilitate their business transactions.

International Competition

Regardless of whether we experience a shortage of lawyers nationally, we could still find ourselves competing more with lawyers from other countries. Legal research is already being outsourced to India, another common law country that has all of our research tools available online.

Japan, which historically produced a percentage of law graduates per capita comparable to that in the US, then utilized an artificially low bar passage rate to funnel most of those graduates to government or business, has recently expanded graduate legal studies dramatically in order to compete better in a global economy. A national commission filed a report at the beginning of this century calling for the establishment of graduate JD programs like those in the US, while continuing its traditional undergraduate law programs. Since 2003 it has opened 67 graduate law schools patterned after those in the US.

Australia has also added JD programs to better equip their undergraduate LL.B. recipients for law practice, so that they may enter the profession at levels more comparable to those of US law graduates.

Problems with Legal Education

Elon's model of engaged learning for legal education is designed to produce those lawyers. In the process of doing so it also addresses two significant and relatively recent problems with legal education. The first is that many law students disengage from their studies in their second and third years of law school. The second is that legal education is perceived by some to have become "soft," which is said to be not a good thing in preparing people for a "hard" profession; it is not a good thing *if* the soft substitutes for rather than supplements the hard. Hard analytical knowledge and skill are essential to lawyer competence.

But the problem is more complex than that. While knowledge and skill are necessary for lawyer competence, they are not sufficient. Whenever lawyers are asked to think of the best lawyer they know and to list the attributes of that lawyer, most of the attributes they list are soft attributes like self-knowledge, empathy, integrity, persistence, and good communication skills. It is these personal attributes that provide the catalysts that allow lawyers to translate knowledge and skill into competent representation, and the absence of which can preclude competence.

"Soft" is probably not a good word to describe attributes and education that equip one to develop the self-management strategies and strategies for dealing with others that make lawyers successful. As Center for

Creative Leadership (CCL) President John Alexander has said, "The soft stuff is the hard stuff." The complaint of those who say that soft legal education does not prepare graduates for a hard profession is not that law schools teach interpersonal skills, but that they do so at the expense of legal education's traditional rigor.

Elon's Model

Elon's educational program is both harder *and* softer than the traditional law school program. It is building on and supplementing, rather than departing from, the traditional strengths of legal education. It is keeping the hard, the rigor, and making it more effective by providing the constant, constructive feedback of leadership education and law practice while keeping its students engaged throughout all three years of law school.

Think about how we learn in law practice. Jeff Kinsler, who's leaving the deanship at Appalachian Law School to join Elon's faculty in January, graduated first in his class at law school, but says he never learned to write until he started practicing law. That was because, as an associate in law practice, when he wrote and turned in a pleading or memorandum, his senior partner marked it up and had him do it again until it was perfect, certainly the equivalent of an A answer in law school. If that is what is required in law practice, where at its best we give new lawyers the feedback they need to produce perfect work products, why not in law school?

The major reason is that for the purpose of giving and receiving feedback the associate-partner ratio in law firms is far superior to the student-faculty ratio in law schools. The second reason is that keeping law students engaged and giving this kind of constant, constructive feedback is hard work: the soft stuff is the hard stuff.

With the help of a host of Triad lawyers, Elon is attempting this hard work, which generates an educational program with ten key differences from other law schools.

1. Importing the best of leadership education into legal education. Most lawyering skills and leadership skills are the same skills, employed to focus resources to create desirable opportunities and outcomes. The most important foundational attributes for competence as lawyers and leaders are knowledge of self, others, and the environments in which they operate. Elon's first-year students had an extended orientation that included not only an introduction to law school and to legal method, but also leadership modules that taught them things about themselves and others that will make them better law students and lawyers. Assessments for development instruments used in CCL's programs were particularly helpful in this regard.

2. Bringing new skills to the faculty. Most law school faculties do not possess an ideal skills mix to prepare their students to enter law practice. Perhaps one reason law schools have not expanded their approaches is that they lack the expertise to do so. Elon has decided to bring new skills to the faculty, employing legal education's first executive coach in residence. Bonnie McAlister, who has taught at CCL and Davidson College, coaches students and faculty in leadership and communication skills. Marty Peters, chair of the Association of American Law Schools Academic Support Section, serves as an academic coach, and Jim Exum, former Chief Justice of the North Carolina Supreme Court, is Elon's first distinguished jurist in residence.

Elon is also developing new skills for existing faculty. To create shared knowledge about leadership development and assessment for development, and to improve their own skills, all faculty members attend CCL's Leadership Development Program (LDP) before assuming their duties at Elon. The faculty also devotes substantial time to improving its teaching and to research concerning teaching, learning and the acquisition of competence. Visiting Professor of Law Steve Friedland and Peter Felten, Director of Elon's Center for the Advancement of Teaching and Learning, are national experts who are leading this effort in the school of law.

3. Providing constant, constructive feedback. Elon endeavors to provide its students more feedback than other law schools. To gain a realistic picture of how they might perform as lawyers, students should receive feedback on all aspects of their performance, not just how well they do in ordering information within a three-hour time frame in answering law school examination questions. While perhaps not keeping them out of the Bramble Bush, feedback at Elon lets students know they might go blind, why they're going blind, where the thorns are, and how to form the neuronal pathways that will allow them to see sooner. With respect to feedback that will prepare them for their fall semester exams, they've had a mid-term exam in Civil Procedure in October, and they will have had a series of practice exams in their other courses to prepare them for finals in December. While many schools have practice exams, few provide feedback to the extent Elon gives its students before their final exams.

4. Using final examinations as assessment for development instruments and rewrites to attain mastery of material. Elon has a three-week winter term in January, which students will use to rewrite any December final exam answer that did not reach an A level, just as Jeff Kinsler and we had to rewrite our work in practice. They will have to attain that A level on their rewrites to demonstrate mastery of the course material and to advance to the spring semester.

Using examinations as assessment for development purposes is not really as novel as it sounds. Think about your final exams in high school and college. Most of us never reviewed our final exams unless we thought the teacher might have made a mistake in grading them. But mid-term exams were different, if we knew that material on those tests was going to be examined again on the final exam. Almost all of us would look at those tests to refresh our recollection about what we knew and to learn what we did not know.

Well, for a lawyer, the real final exam is law practice, which makes a law school course's final exam like a mid-term. While Elon students will not have to rewrite answers that fail to reach the A level in subsequent semesters the first-year winter term experience will equip them to self-evaluate subsequent exams. For exams in the second through fifth semesters, they will be asked to review their exams and write brief analyses of what they knew and did not know, why they knew and did not know different aspects of the course, and what their plans are for learning what they did not know before they start practicing law.

5. Involving the bar in creating a Preceptor Program. Elon's is an intense educational program, and to help Elon's students deal with its intensity, 53 practicing lawyers have volunteered to create what is believed to be the first law school Preceptors Program. Each preceptor is assigned two or three students. Every other week these preceptors observe their students in class and give them feedback on their preparation and performance.

The Preceptor Program is undoubtedly Elon's most important innovation. That this many lawyers would not only be willing to spend this much time with Elon's students,

but also to spend another six hours in preceptor training, and that dozens of other lawyers have volunteered to invite Elon law students into their offices to observe interviews, negotiations, mediations, and depositions, is symbolic of the ideals of our profession.

There's nothing quite as wonderful for law students than being around real lawyers in a law school setting. Every Thursday afternoon at 4 o'clock Elon has a tea for its students and faculty and the bar. Elon will endeavor to provide free CLE to the bar before one of the Thursday teas each month.

6. Adopting graduate school grading standards. Most law schools have adopted *de facto* graduate school grades, giving almost all A's and B's to their students, but they have not adopted the rigor of graduate school grading that requires a B average to receive a graduate degree. Some students at these schools are misled into believing they are performing satisfactorily because they are receiving C's, only to learn of the profession's expectations when they fail the bar exam. Once they understand what is expected of them, they study harder than they did in law school and pass the bar exam. Requiring B's as the measure of satisfactory work should preserve rigor and discourage disengagement at any point in law school, and Elon has adopted that graduate school grading standard.

The Second and Third Years of Law School at Elon

The second and third years are also a bit different at Elon. Four initiatives are worthy of mention.

1. Structuring the curriculum to maintain student engagement and enhance competence. Elon has analyzed the elements of knowledge and skill, doctrinal and general, technical and interpersonal, that lawyers need to function competently in their roles as analysts, advocates, and counselors. Its upper level curriculum will be structured to require that each student acquire a foundation that will equip that student to master whatever field or fields of law the student selects as a life's work. Each student will be required to select at least one of four upper level concentrations: business, litigation, public interest, or general practice. Each concentration contains required courses and electives that will keep students engaged throughout their three years at Elon.

2. Requiring international awareness. Elon is structuring a required second year course that will orient students to global legal, social, and economic environments while providing overviews of comparative, public, and private international law. The winter term during the second and third years may be utilized for foreign travel and study.

3. Providing a capstone leadership experience in the third year. Elon's law school is located at the center of a diverse urban network of state and federal courthouses and government offices, businesses, and nonprofits that provide unusual opportunities for civic engagement and public service. Before they graduate, Elon law students will be required to plan, implement, evaluate, and report on a capstone leadership experience of their own design, where they have attempted to make something happen to improve the law school, the legal order, or some other aspect of the world.

4. Being committed to the optimum development of each and every law student. The single best predictor of success in law practice is one's attitude toward one's studies in law school, not one's class rank. Nevertheless, law schools sometimes communicate to the bottom three-fourths of the student body, perhaps the bottom 90% at some schools, that they are not valued intellectually by many of their faculty members. Three years ago I communicated that thought to a distinguished judge, the recent recipient of his school's distinguished alumnus award, after he had appeared on a panel at a national meeting of legal educators. His face lit up as if he had been waiting 30 years to hear that admission from someone in the academy. He replied, "Leary, I worked hard all three years of law school, but I never got out of the bottom half of my class. I knew I was going to be a good lawyer, but I had to do it all by myself." No one who pays tuition to join the profession should have to feel that way, and Elon's team of faculty, coaches, and preceptors are dedicated to the proposition that no one will feel that way at Elon.

Legal education and the legal profession face interesting times in the next quarter-century. Elon's model of engaged learning should position it to lead constructive change in the profession and in legal education.

Elon's faculty knows that *they* cannot establish a national model of engaged learning. However, they believe that they, plus the lawyers of North Carolina, those who serve as preceptors and those who support Elon's work in other ways, can establish this much needed model.

Come to Greensboro for a Thursday tea, look over Elon's H. Michael Weaver Building, and let's talk about it. ■

Leary Davis is dean and professor of law at the new Elon University School of Law. He was also founding dean of Campbell University School of Law, and before that practiced law in Wake County. He holds law degrees from Wake Forest and Columbia.

Our Judiciary Under Attack—A Call to Service

By Thomas W. Ross

The following remarks were made by Thomas Ross on April 20, 2006, at the quarterly meeting of the State Bar Council.

Thank you for your kind introduction! I appreciate Ron mentioning some of my awards. I used to say when asked about the awards that I have received that I was like a "turtle on a fence post"—I didn't get there by myself. But, that was before I was talking to this old farmer about a particular politician in Washington—I'll let you fill in the name of anyone you want.

When asked about this politician, the old farmer said that he is just like a "post turtle." I asked him to explain to me what he meant. This is what he said, "When you're driving down a country road and you come across a fence post with a turtle balanced on top, that's a 'post turtle.'" The old man saw a puzzled look on my face, so he continued to explain about how the Washington politician was like a "post turtle," "You know, he didn't get there by himself, he doesn't belong there, he doesn't know what to do while he's up there, and you just want to help the dummy get down."

Thank you also for inviting me to be with you today. I am always happy to be in the Queen City. My grandfather used to own a laundry just down the street and was treasurer of Meyers Park Presbyterian Church for 40 years, I went to college at Davidson, and my daughter currently lives here, so I feel connected to Charlotte in many ways.

Speaking of my grandfather, those who have heard me speak know I always begin my speeches with an old Scottish prayer my grandfather taught me. It goes like this: "Lord, make them like me and if they don't please afflict them in some way so that when they leave I will know who they are."

I am delighted to be with you tonight to celebrate and recognize public service by legal professionals. I want to particularly hold up and congratulate those among us who serve the public through elective office. I want you to know that I think I can speak for all of us here tonight in saying that we appreciate your willingness to go through what it takes to get elected and to put up with what you must tolerate once you are in office. It is not uncommon for you to be attacked and vilified by opponents. I can only urge you to remember the words of Dr. Frank Graham, former president of the University of North Carolina and a member of the US Senate, who said when attacked in his race for the Senate, "I shall not bend to the power of those who make the attack, but seek sympathetically to understand them."

I was asked to speak tonight about the status and needs of our judiciary. Before I get to that topic, I want to commend each of you for your dedication to public service and service to your profession. I am certain you have all committed many hours to serving your community and your fellow residents and you do so in exceptional ways. You make a difference in individual lives, but also in the life of your community. You have seized upon what I think is one of our basic human responsibilities—to serve our fellow man and woman and make the places we live better. It is also folks like you, who commit themselves to serving others, who make the great experiment in democracy work. And, as Winston Churchill said, "Democracy is the worst form of govern-

This problem ... is exacerbated by legislators who get angry with the courts over particular decisions and use this as an excuse for not properly funding the courts. Whatever the cause, court funding in North Carolina is reaching crisis dimensions and the credibility of the courts is suffering as a result.

ment except for all the rest."

As people and lawyers committed to service, whether in government, the non-profit sector, community organizations, or your profession; however, I would like to ask even more of you. I ask you to stand up for democracy and for our form of government which I feel is under significant stress. Allow me to explain.

We would all agree, I think, that the rule of law not only provides order to government, but is a tool for positive social change. As lawyers, you and I have the opportunity to help people, to change people's lives, to help our nation live up to its promise of justice for all. I believe that, among the three branches of government, the judicial branch is the one which must maintain greatest credibility, and which must provide the people with the greatest sense of security that they are truly equal under the law. This has been part of our collective psyche since the very beginnings of this nation. It is the judiciary that protects our rights—particularly the rights of the minority. The majority needs the judiciary less. After all, it has protection of the elected legislative and executive branches. The minority depends on the judiciary and this is even more of a reason we need to protect the independence of the judiciary—so the courts can decide the issues that are not necessarily supported by the majority and, thus, may be unpopular. The rule of law depends upon the respect the public has for the integrity with which our laws are interpreted. The credibility of the courts is what allows the rule of law to continue and anarchy to be avoided. As George Washington wrote during his first term in office, "The administration of justice is the firmest pillar of government."

Friends, I believe our democracy is at risk. I am not trying to sound alarmist. But the fact of the matter is that one of our branches of government is under attack, both directly and indirectly, and the very separation of powers that has kept our democracy alive and vigorous is in jeopardy.

First, allow me to discuss briefly the direct attacks. I gave a speech at Law Day here in Charlotte last year. I quoted at length direct attacks on the independence of the courts from many politicians in both parties. I won't take time to repeat those words tonight. We all have heard them and know the judiciary is, at times, being used as a whipping boy by public officials and opinion leaders who believe that the way to move their agenda forward is to chastise, threaten, and bulldoze this country's system of justice.

The point is, however, that the constant, degrading, and sometimes personal attacks on judges and the judiciary by political and other leaders are slowly eroding the credibility of the judiciary and will ultimately, I fear, undermine the rule of law. We cannot let the desire of a few to obtain their own desired short-term outcomes destroy the fabric of our constitutionally created institutions.

As lawyers, as people who believe in the system of justice, you and I have an obligation to speak out against these words and this conduct and to constantly educate the public and politicians about the value and importance of an independent judiciary that can impartially resolve disputes based on the law and facts and not under threat, duress, or coercion.

Quoting the 1935 case of *Humphrey's Executor v. United States*, Judge Birch of the Eleventh Circuit in his opinion in the Terry Schaivo case said, "the Constitution mandates that each of the three general departments of government must remain entirely free from the control or coercive influence, direct or indirect, of either of the others."

The rhetoric of those who want to control the third branch of government to advance their own agenda is not the only danger to judicial independence. Let me quickly mention a few more.

Judicial selection and campaign financing are still problems in our state. Judges must not only *be* impartial and fair, they need to *appear* to be impartial and fair.

Campaign contributions are a problem. There is no way around it. A system that requires judges to raise money, most of which comes from those who have an interest in the cases that come before the judge, puts great pressure on the ability of judges to be impartial and, I believe, makes it nearly impossible for them to be seen by the public as always impartial.

Fortunately, North Carolina has enacted public financing for appellate elections and this change appears to have been somewhat successful last year. It is, in my view, a positive step for good government in North Carolina.

Also, as someone who ran statewide in a partisan election and in a district-wide partisan election for Superior Court Judge, I can say I think we have made a very positive step in the right direction by enacting non-partisan elections for all judges in this state. I think this system is an improvement and is generally working well at the trial court level. We have fewer contested elections and the amount of money invested in those elections is on the decline.

I am not sure the non-partisan system is working as well at the appellate level, but I think it is still better than what we had before. Over time, I hope candidates will not run on party labels, but instead will focus on their qualifications. I commend Judge Howard Manning for taking this principled stand in the last election.

I remain convinced that elections are not the best way to select and retain judges. Judicial independence requires, in my view, that we appoint judges. With that change, I think we should institute a system of review and retention that is based on the quality of a judge's work, his

or her work ethic, demeanor, and promptness because it is important that there be a means of holding judges accountable.

Lack of diversity on the bench also puts judicial independence at risk.

Many of you have heard me talk about this issue before. Why do I think it is so important? It is because of the way growing numbers of Americans see our justice system. Increasingly, there are large segments of our society that no longer believe the courts are fair to everyone. There is a belief by many of our citizens, both among whites and people of color, that justice is available only to whites and to the wealthy.

Many citizens do not feel the poor get a fair shake and they believe the system discriminates against people based on inappropriate factors, including race and ethnicity. These are concerns we don't like to hear about. These are things that are uncomfortable to talk about, particularly for those of us who are white and well off economically. Some believe these are only problems of perception and have no basis in fact. I, however, believe they are real.

Our state and nation are becoming increasingly diverse. Our population looks much different than it did ten years ago and it will be even more diverse in another ten years. If we want our justice system to enjoy the confidence of this diverse population, the system must provide the real opportunity for all people to see themselves in the mirror when they look at the judiciary. No longer can we afford to have only a small percentage of our judges made up of people of color and women. The judiciary must reflect the populace it serves. As President Franklin D. Roosevelt said, "Among American citizens there shall be no forgotten men (and I am sure he would include women) and no forgotten races."

The final issue that I believe directly impacts judicial independence is funding for the courts. I'm sure you would expect a former director of the Administrative Office of the Courts for the state to raise this issue, particularly when there are legislators around. My experience in Raleigh only strengthened the views I held previously and continue to hold. If you don't provide the courts with adequate resources so they can do their job without undue delay, the public will lose confidence in the system. We have seen this happen when business litigants hire a "private judge" so they can get their case disposed of without waiting several years. Most people who come into the system don't have that option. If folks see a system that is way behind, if they hear law enforcement officers say we don't arrest folks for many misdemeanors because we know the courts are too busy to fool with them, and if these people can't get the service they need from the Clerk's Office, they lose confidence in the system. And when that happens the credibility so essential to maintaining the rule of law takes a hit.

This problem has been caused in part by recent budget problems, but it is a long term, chronic problem. It is exacerbated by legislators who get angry with the courts over particular decisions and use this as an excuse for not properly funding the courts. Whatever the cause, court funding in North Carolina is reaching crisis dimensions and the credibility of the courts is suffering as a result.

So, back to what I ask of you regarding these issues.

I ask you to support efforts to move to an appointment system for selecting appellate judges. This is a change long overdue which, in my view, has growing support and more likelihood of success than at any time in recent history.

You can continue to support the public financing system in North Carolina by checking off the box on your own tax returns that allocates $3 to the pubic financing fund and urging your clients to do the same. It may be too late for most of you this year, but some, like me, had to get an extension and may still have the chance. But, we can all remember to check off next year.

You can support and encourage people of color and women in the profession to seek positions on the bench. It may mean some of us white guys have to be willing to step aside for the good of the system we love. This may be a personal sacrifice, but it is, in my opinion, right and better for the common good if we are to build a diverse judiciary that reflects the society it serves. I commend Judge Bill Reingold in Winston-Salem who recently changed his mind and decided not to run for the Supreme Court against Justice Patricia Timmons-Goodson because he believes in diversity on the bench.

You can support increases in court funding. Speak out about how the underfunded system causes delays and backlogs that are hurting your clients, your community, and your practice.

Work with the business community to help them understand the need for a strong, well-funded, independent judiciary. Encourage legislators to do what is needed and what is right by the third branch.

Finally, you must speak out! As Martin Luther King said, "Our lives begin to end the day we become silent about things that matter." If lawyers don't care enough about the rule of law and an independent judiciary to protect and defend it, who will? It is your responsibility and mine to step up to the plate and offer a strong defense of our justice system and the need to protect its independence.

Speaking up on these issues is, in my view, part of your public service.

Many of you are familiar with Marian Wright Edelman, the first African American woman accepted to the State Bar in Mississippi and now the director of the Children's Legal Defense Fund. When it comes to public service, she offers these words: "Service is the rent we pay for being. It is the very purpose of life, and not something you do in your spare time." I think she hit the nail on the head.

Let's keep paying our rent every day.

Thank you for allowing me to speak with you tonight and please remember that Scottish prayer when you leave.

Thank you! ■

Thomas Ross is the executive director of the Z. Smith Reynolds Foundation in Winston-Salem, North Carolina. He has been with the foundation since 2001. Previously, he was the director of the NC Administrative Office of the Courts; a NC Superior Court Judge; chair of the NC Sentencing and Policy Advisory Commission; administrative assistant to former Congressman Robin Britt (D-NC); a partner in a Greensboro law firm; and assistant professor at the Institute of Government. He earned a BA from Davidson College in 1972 and his JD with honors from UNC-CH School of Law, in 1975; National Judicial College, 1985.

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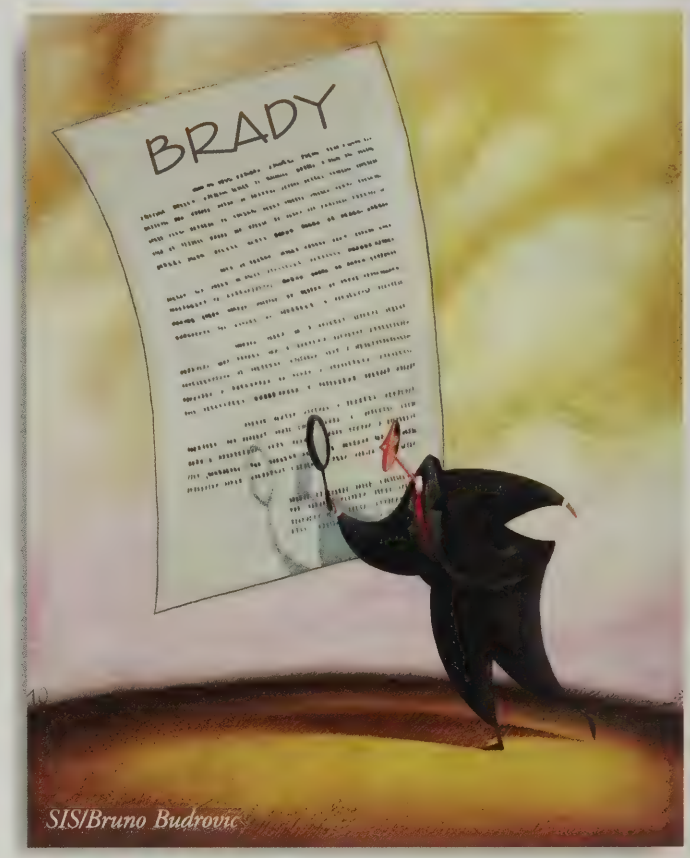
FOR THE ISSUES OF LIFE IN LAW

Disclosure under *Brady v. Maryland*—A Prosecutor's View

By Jeff Hunt

Like many, I carry around each respective issue of the North Carolina State Bar *Journal* until I have time to sit down and read it. I have just completed the article written by attorney Mike Klinkosum of the capital defender office and criminal defense lawyer Brad Bannon entitled "*Brady v. Maryland* and its Legacy—Forging a Path for Disclosure" in the Summer 2006 *Journal.*



SIS/Bruno Budrovic

I am a three term elected district attorney, and past-president of the North Carolina Conference of District Attorneys. I was pleased that Mr. Klinkosum and Mr. Bannon, unlike many who discourse about North Carolina prosecutors' evidence disclosure obligations, avoided the incorrect and unfounded blanket assertion that North Carolina prosecutors who do not disclose certain evidence under the *Brady* cases are automatically engaging in prosecutorial impropriety or "prosecutorial misconduct." This is a dangerously irresponsible assertion many seemingly serious defense attorneys cavalierly toss out without much apparent thought.

The authors, however, have apparently made the same substantial error in their analysis and description of the *Brady* requirements of disclosure, that the vast majority of defense attorneys who write on the subject make. *All* impeachment evidence is simply not required to be disclosed. *Giglio v. US*[1] and subsequent cases are crystal clear in stating that *only material* evidence (whether impeachment evidence or other) is required to be disclosed. *Giglio* and *Napue v. Illinois*[2] hold, as the authors stated: "that *when the reliability of a given witness may be determinative of guilt or innocence...*" the evidence affecting credibility of the witness must be disclosed per *Brady*, as "exculpatory."

Clearly none of the cases have changed the initial "*materiality*" requirement established in the 1963 decision of *Brady v. Maryland*:[3]

> We now hold that the suppression by prosecution of evidence *favorable* to an accused upon request violates due process *where evidence is material* either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. [emphasis added]

This is a critically important point and distinction because it can lead to the above-mentioned unfounded accusation of prosecutorial misconduct when not properly understood.

Under the cases involving the *Brady* disclosure requirements, as evolved through today, prosecutors must determine if evidence is first "*favorable.*" Next, is that *favorable* evidence "*material*"? All favorable evidence is not necessarily *material.* Only evidence *favorable*

and *material* is required to be disclosed under the due process analysis established in these cases. This is true whether it is impeachment evidence or other evidence.

Under the cases, only impeachment evidence which relates to a witness whose testimony "*may be determinative of guilt or innocence*" is required to be disclosed by prosecutors. This is simply another way of stating that the evidence (impeachment or other) must be material and favorable to the defendant before its non-disclosure constitutionally violates that defendant's due process.

The significance of this is simply that, under the *Brady* line of cases, in deciding what is required to be disclosed, the prosecutor must apply his/her good faith discretion by determining the favorability and materiality of the evidence. It is misleading at best to claim: "Impeachment Material is Exculpatory Evidence" (one of the section headings of the Summer 2006 *Journal* article) and therefore necessarily must be disclosed. Only material and favorable evidence can be exculpatory and therefore, must be disclosed.

The problem is that these kinds of misleading descriptions of the *Brady* requirements lead the public often to erroneously conclude that, even when a prosecutor applies his/her good faith discretion and determines certain evidence is not subject to disclosure because it is not material and favorable, the prosecutor has engaged in "prosecutorial misconduct" *per se*. The unique responsibilities of the prosecution in searching for the entire truth on the one hand, while acting as the prosecuting advocate on the other, are difficult enough without having the "misconduct" label hung around his/her neck for the simple exercise of good faith discretion required to be applied by the *Brady* line of cases.

Justice Souter in the *Kyles v. Whitley*[4] opinion gets very close to the crux of the entire matter with a few succinct statements.

> ...The Constitution is not violated every time the government fails or *chooses not to disclose* evidence that might prove helpful to the defense [citation omitted]. We *have never* held that the Constitution demands an open file policy (however such a policy might work out in practice), and the rule in *Bagley* (and hence in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for all prosecutorial disclosures of *any evidence tending to exculpate or mitigate*. [emphasis added]

In describing this required application of good faith discretion by prosecutors seeking to apply the dictates of the *Brady* line of cases so as not to violate the defendant's due process, Justice Souter added:

> This means naturally, that a prosecutor anxious about tacking too close to the wind will disclose...[citation omitted] (The prudent prosecutor will resolve doubtful questions in favor of disclosure.) This is as it should be. *Such disclosure will serve to justify trust in the prosecutor as the representative...of a sovereignty...whose interest... in a criminal prosecution is not that it shall win a case, but that justice shall be done.* [emphasis added]

The good faith non-disclosure of evidence (impeachment or other) by the prosecutor for reasons of *immateriality* or *unfavorability* to the defendant cannot, and should never be referred to as prosecutorial misconduct. Likewise, absolute statements that the *Brady* line of cases *require* disclosure because, for example, "Impeachment Material is Exculpatory Evidence," without mention of the sometimes confusing "materiality" and "favorability" analysis required of the prosecutor under the *Brady* line of cases should be avoided.

In 2004 representatives of the North Carolina Conference of District Attorneys, Attorney General's Office, North Carolina Academy of Trial Lawyers, and the Indigent Defense Services Agency hammered out a new criminal discovery bill which essentially enacted a statutory "open file" discovery law for North Carolina. While it needs some "fine tuning" (protections from disclosure of certain confidential informants and identification information of certain victims need to be enacted), the law for practical purposes relieves the prosecution from a large part of the torturous above-referenced analysis and the "...tacking too close to the wind..." mental process foisted upon prosecutors by the *Brady* line of cases which Justice Souter so aptly described.

To be certain, the prosecutors must in all cases apply the *Brady* line of cases along with the new North Carolina discovery statute because in the rarest of cases the *Brady* line of cases might require the disclosure of something which the new discovery statute might miss. However, in practical terms, it is difficult to imagine what might fall into this category.

In the future, prosecutors will find several things to be true:

1. The *Brady* line of cases when, closely examined, will be found to require disclosure of *almost* everything now required by the new North Carolina discovery statute.

2. The new discovery statute in our state virtually relieves prosecutors of having to become enmeshed in the nearly super-human determination of what can and cannot be withheld from disclosure under the *Brady* analysis.

3. The state will save virtually millions of tax dollars by vastly reducing the number of appellate cases reversed because a well-meaning prosecutor failed to disclose certain evidence (impeachment or other) which he/she determined to be unfavorable or immaterial or both; but which a panel of judges or justices later determined was required under due process to be disclosed.

4. Far fewer prosecutors will be called to testify about their disclosure/non-disclosure analyses years afterward at motion for appropriate relief hearings.

5. The new discovery statute will virtually dissolve even the slightest argument that might have been assembled to justify a death penalty moratorium. Under the new discovery statute we have simply moved the "open file" complete disclosure requirements which already existed *after* the defendant's conviction (e.g., motion for appropriate relief practice in North Carolina) to a point in time *prior* to the trial. This in turn eradicates an entire line of "fairness" complaints once marched out in support of efforts to appeal or succeed at the motion for appropriate relief level.

Thanks to attorneys Klinkosum and Bannon for their well-drafted article with these gentle caveats. ■

Jeff Hunt is in his third term as district attorney of the 29th Prosecutorial District, and recently won re-election. Hunt was president of the NC Conference of District Attorneys the year the discovery bill was passed, and was therefore chairman of the negotiating team who hammered out the precise language.

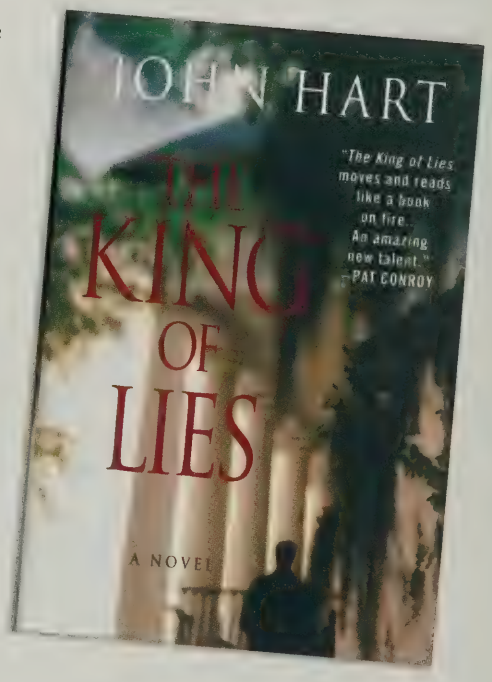
Endnotes

1. *Giglio v. US*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)
2. *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)
3. *Brady v. Maryland*, 373 U. S. 83, 83 S. Ct. 1194, 10 L. Ed. 2 d 215 (1963)
4. *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)

An Interview with John Hart

BY JOHN E. GEHRING

My interview with John Hart took place on the Olde Beau Golf Course in Alleghany County. We agreed to play until we had finished 18 holes or lost 18 balls, whichever first occurred. Since this interview, I have been humming the tune "to dream the impossible dream" repeatedly. John Hart has a dream, and the dream is coming to fruition.



Q: Please talk about John Hart.

I was raised in Salisbury, received my secondary education at Woodberry Forest, my undergraduate degree from Davidson, and my law degree from Franklin Pierce Law School in New Hampshire. I have a masters degree in accounting and have worked as an attorney, accountant, and stockbroker. Part of my youth was spent working on (and flying) helicopters in Alaska, tending bar in a London pub, and living for eight months in France. I think I liked the pub work the best.

I am happily married and we have two daughters. Without the strong support of family, friends, and even some strangers, I would not have had the wherewithal to pursue the dream of writing full time. I consider myself blessed to have had such good fortune.

Q: Why a murder mystery for your first novel and rural North Carolina as your setting? Also, do I detect some Faulkner-type characters running through your book?

The King of Lies is much more than a murder mystery, although the murder of the protagonist's father is the major plot point of the book. Rather, the growth of Jackson Workman Pickens, known as "Work" to all, from a courthouse drunk to a man of conscious reflection, was my aim. The protagonist suffers from the same ills as much of society and a lot of the book is about finding the strength to recognize what he truly values and then leveraging that awareness to pull himself up by his bootstraps. I tried to ground it in what criminal defense lawyers see every day, the theater of the real. Chronic defendants, jaded lawyers and bailiffs, all of whom pretty much know who is guilty and who is innocent. Small towns can be the home of the rich, the want-to-be rich, and the poor. Work learns that his privileged upbringing means nothing when the tables turn and "society" passes judgment. Being cast out hurts, but it also opens new windows of perspective. In the end, that's what saves him.

Q: You have not mentioned redemption but have hinted at the same.

We see Work in many states: as an unsuccessful, hard-drinking lawyer, a defendant in the murder of his father, the big brother of a disillusioned sister, and a mentally clean and sober man. Along the way, he leaves his wife, finds adultery surrounding him, and learns some hard truths about murder, friendship, family, and even himself. There is so much more to tell but then, I might ruin the book for future readers.

Q: Just how hard was it to get published?

WHEW! I found out early on that you just cannot call up Random House or Doubleday or St. Martin's press and tell them that you are an unknown/inexperienced writer and that you have a book for them to read. The laughter can be heard around the world. You must find an agent with a passion for your work. He must have ample experience and the good will of editors at major houses. No editor will look at your work if he or she doesn't respect the agent. The editor, in the end, must share the same passion, see something in your work that makes it stand out from the other hundred manuscripts crossing his desk that week. In the end, everyone has a stake in the book's success: author,

agent, and editor. The process can take a long time, and be very frustrating. Rejection is a big part of it.

Q: It seems that you are now off and running! Can you tell the readers how many books have been printed? Also, how did you obtain the front page endorsement from Pat Conroy?

The first printing was 75,000 books. It is now in its fifth printing. Rights have been sold in about 15 countries, with translations into 12 foreign languages. None of the foreign publishers have released the book yet. However, it is also a featured selection of the Mystery Guild, The Book-of-the-Month Club, The Literary Guild, and the Doubleday Book Club. They print their own books, and I have no idea how many they've put out there. Movie rights have been acquired and hopefully you will see *The King of Lies* on the big screen.

I met Pat Conroy at an author's event in Charleston. A mutual friend introduced us. I told him that he was an idol of mine and that I would be honored if he would read my novel. He read the book and consented to write the "blurb" on the front cover. Getting to know him has been one of the highlights of this entire process.

Q: Speaking of the front cover, is the building pictured thereon a Southern mansion or a courthouse?

I'll let you and my readers figure that out. What the Southern mansion and what the courthouse represent play a large part of the story. Your imagination will take you in different directions as you read *The King of Lies.*

Q: What is next for John Hart?

I am working on my next novel which will be released in the fall of 2007. The protagonist will not be a lawyer. This story focuses on the other side of the spectrum, namely a young man hounded out of town five years earlier after narrowly beating a murder charge. Now he's back, and no one knows where he's been or why he's come home. Suffice it to say, bodies start piling up.

Also, I am working to improve my golf, especially on mountain courses. And, I still have some of my 18 golf balls left! ■

John Gehring graduated from the University of North Carolina with undergraduate and law degrees. His postgraduate work was done at the Hague Academy of International Law and the University of Amsterdam, both located in the Netherlands. He practices law in Walnut Cove, North Carolina, and specializes in criminal defense. His international law training fell by the wayside.

Southern Mystery is Good Enough to be Called "Literature"

BY LINDA BRINSON

The King of Lies. By John Hart. St. Martin's. 310 pages. $22.95.

It's been a busy spring, so busy that when I finally grab a few moments with a novel at the end of the day, I usually nod off before I can find the passage I was reading when the book slipped out of my hand the night before. With most books, I long for a list of characters and a plot summary to refresh my memory; a computerized "search" function would really help. It can take a long time to finish a novel when you have to read pages over and over again.

So I am offering a high tribute to John Hart, North Carolina's latest literary sensation, when I say that I read his novel *The King of Lies* in a couple of nights, sitting up later than I should, turning just one more page. And then one more. No backtracking; no repeats.

What an impressive first novel this is; heck, it would be impressive if it were Hart's fourth effort, or his 22nd. No wonder the publisher is giving it a big debut, and early reviews are glowing.

The King of Lies is one of those fine books that is both a gripping mystery/thriller and a fully fleshed, thoughtful work of literature. Set in Salisbury, it has the added bonus of being in the best traditions of Southern fiction—family ties and secrets, violence simmering barely beneath the surface, lush descriptions, a strong sense of place. The prose is lush and poetic without being overdone or self-indulgent.

This is the story of Jackson Workman Pickens, known to most people somewhat ironically (he concedes) as "Work." When we first meet Work, we learn that he's the son of a powerful, ruthless, and rich small-town lawyer. Work has limped along in his father's footsteps, taking up his profession but without the same enthusiasm or results.

His disenchantment with the legal profession is far from Work's only problem. His marriage to a socialite is in a slow, painful, downhill slide. The unsuitable woman he didn't marry is still the one he loves.

Their father's overbearing cruelties have badly, maybe permanently, damaged Work's only sister. And one shattering night a year earlier, their mother died in a fall, and their father disappeared.

Now, with the discovery of his body, their father's disappearance has become a murder case. And before long, Work finds himself high on the list of suspects. He knows he didn't kill his father, but he's hesitant to try to clear himself by finding out who did. He's afraid that his fragile sister might finally have been pushed too far.

It doesn't take much poking around in the past to crack the thin veneer of polite, upper-crust Southern society and expose some gritty secrets.

In less skilled hands, this story might become melodramatic. But John Hart keeps his plot and his prose under the kind of taut control that evokes the image of a skilled rider and a spirited racehorse.

Hart's characters are complex and achingly human. As the book progresses, Work learns a great deal about the past and his family. Even more important, though, is the understanding he gains about himself. The more Work confronts his own failings, the more honestly he looks at where he's been and where he wants to go, the more the reader identifies with and cares about him. Here is a man forced from his quiet desperation, a man at a crucial turning point.

Don't miss this book. The only problem with taking *The King of Lies* on vacation is that you'll finish it too soon. If you start reading it on the beach, you'd better load up on the sunscreen. ■

Linda Brinson is the Book Page Editor for the Winston-Salem Journal.

The LAP and Addiction Treatment—Dogma vs. Science

By Alan V. Pugh

"The worst of madness is a saint run mad."
-Alexander Pope

The New York Court of Appeals, after a lengthy review of the texts and teachings of the "12 step" program of Alcoholics Anonymous (AA) in *Griffin v. Coughlin*, 649 NYS 2d 903 (N.Y. 1996), cert. denied, 117 S. Ct. 681 (1997), concluded:

> The foregoing demonstrates beyond peradventure that doctrinally and as actually practiced in the 12-step methodology, adherence to the AA fellowship entails engagement in religious activity and religious proselytization. Followers are urged to accept the existence of God as Supreme Being, Creator, Father of Light and Spirit of the Universe. In "working" the 12 steps, participants become actively involved in seeking God through prayer, confessing wrongs, and asking for removal of shortcomings. These expressions and practices constitute *as a matter of law*, exercise for Establishment Clause purposes,...AA books are overwhelmingly religious and literally urge performance of quite traditional devotional exercises in working the 12 steps.

Other appellate courts have concurred. (*See Kerr v Farrey*, 95 F.3d 472 (7th Cir.,1997), and *Warner v. Orange County*, 115 F. 3d 1968 (2nd Cir., 1997) *Also see The Requisition of God by the State*, 47 Duke Law Journal 785 (Feb. 1998). Yet as recently as the Fall 2006 edition of this *Journal*, the director of our Lawyers Assistance Program (LAP) flatly stated; "in fact and in theory AA is not a religion and promotes no religion." He then went on to assert as an established fact that chemical addiction is a disease.

The United States Supreme Court has twice been confronted by cases in which alcohol dependency as a disease was presented in mitigation, avoidance, or defense by litigants. Justice Marshall in declining to overturn laws penalizing public drunkenness, found in *Powell v. Texas*, 392 U.S. 514 (1968), that:

> Furthermore, the inescapable fact is that there is no agreement among members of the medical profession about what it means to say that "alcoholism" is a "disease." One of the principal works in this field states that the major difficulty in articulating a "disease concept of alcoholism" is that "alcoholism has too many definitions and disease has practically none."...Debate rages within the medical profession as to whether "alcoholism" is a separate "disease" in any meaningful biochemical, physiological, or psychological sense, or whether it represents one peculiar manifestation in some individuals of underlying psychiatric disorders.

Likewise writing for the majority in *Traynor v. Turnage*, 485 U.S. 535 (1987), Justice White in refusing to overturn the Veterans Administration's characterization of alcoholism as a willful act, stated at pp. 550, 552:

> We are unable to conclude that Congress failed to act in accordance with §504 in this instance given what the District of Columbia Circuit accurately characterized as a substantial body of medical literature that even contest the proposition that alcoholism is a disease, much less that it is a disease for which the victim bears no responsibility...It is not our role to resolve this medical issue, on which the authorities remain sharply divided.

The LAP Director's article further states that, "AA is by far the most effective program in helping those suffering from alcohol addiction stay sober." Yet, Dr.William R. Miller, distinguished professor of Psychology and Psychiatry at the University of New Mexico found in his *Handbook of Alcoholism Treatment Approaches* (Hester & Miller, 2003), from an examination and comparison of 381 research studies of 48 treatment modalities, that AA ranked 38th in effectiveness. In commenting on AA using its professional moniker, "12-Step Facilitation," which he described as "treatment-as-usual," Dr. Miller wrote at p. 41:

> The generic "Minnesota model" program that continues to dominate US addictions treatment is broadly characterized by a milieu advocating a 12-step philosophy, typically augmented with group psychotherapy, educational lectures and films, AA meetings, and relatively unspecified general alcohol counseling often of a controversial nature. To fill in the complete set of treatment methods with the least evidence of effectiveness, one need add only videotape self-confrontation and a host of failed medications. The negative correlation between scientific evidence and treatment-as-usual remains striking, and could hardly be larger if one intentionally constructed treatment programs from those approaches with the least evidence of efficacy.

The LAP advocates abstinence as the only stable outcome of an addiction treatment program, but as Dr. Stanton Peele has pointed out in his book, *The Truth About Addiction and Recovery* (Fireside, 1991), numerous research studies demonstrate that moderation is statistically a far more likely outcome for those diagnosed as alcohol dependent than abstinence.

What is going on here? The director and

the people who run the Lawyers Assistance Program are good, well motivated individuals charged with the admirable goal of helping attorneys overcome their addictions and assisting them with mental health issues like depression.

Why do they seem to advocate absolutist positions about which the experts in the field disagree?

Part of the answer lies in the practice and history of AA and the 12 steps, and the fact that many people employed in the addiction treatment industry, and involved in our LAP, overcame their own addictions while practicing and participating in 12-step programs, primarily AA.

The 12 steps and the program of Alcoholics Anonymous was developed and set out by William (Bill) Wilson, an alcohol dependent stockbroker, in a book published in 1939 entitled *Alcoholics Anonymous* (AA World Services). Mr. Wilson was a member of an evangelical Protestant sect known as the Oxford Group when he had his "white light" experience that spontaneously ended his drinking. Drawing heavily on the five steps to purity advocated by Oxford Group members, he developed 12 steps to form the basis of a recovery program he outlined in his "Big Book" (as it is called in AA circles). This work is widely available in libraries and bookstores, and has sold millions of copies over the years.

Even a cursory review of the "Big Book" will show that the capitalized word "God" appears on over 100 pages, and that although alcohol is mentioned in only one of 12 steps, God is mentioned in five of the steps. It teaches acts and spiritual exercises quite familiar to most Christians including: recognition of the Deity (Step 2.); submission of self-will to God (Step 3.); examination of moral faults (Step 4.); confession (Step 5.); absolution (Step 7.); atonement (Step 9.); prayer and mediation (Step 11.); and evangelism (Step 12.). It is really a quite conventional, albeit dated, faith based self-help book. The LAP in its "contracts" requires that lawyers obtain a copy of "the Big Book," study it, and attend numerous 12-step meetings.

What becomes apparent is that the real message of the "Big Book" is much more than a program to stop drinking, it is nothing less than a program to live by, to practice the principles laid down as Mr. Wilson says, "in all our affairs" (Step 12). Adopting a belief system grounded in the AA philosophy is powerful psychological medicine indeed. It is a way of life. It is a manner of living and a matter of faith for those who stopped their addictive behavior after being introduced to its precepts. This is particularly true for the many reformed drinkers who are now employed in the 15 billion dollar-a-year addiction treatment industry in the United States. (Given our more severe problems it is ironic that the US is the only developed country in the world that uses 12-step facilitation as its primary modality of chemical dependency treatment.)

It is not an uncommon or surprising phenomenon for a practice, custom, or belief to persist and be zealously defended in the face of research and evidence to the contrary. Many of us have had the experience of cross-examining otherwise honest people who under oath will deny matters that are objectively true, or who will assert the truth of things objectively false or questionable, if the answer touches on their deeply held beliefs, their core self-image, or seriously affects their way of making a living.

This may be the key to the reason for the adamant position of the director in his *Journal* article. While there is no medical or scientific evidence that substance abuse is an incurable disease, is progressive, requires lifetime abstinence, or is most successfully arrested by 12-step facilitation, these very notions are held as fact by 12-step advocates. For a participant to question these propositions in the context of a 12 step recovery program is usually taken by treatment "professionals" to be evidence of something called "diseased thinking," of "self will run riot," or variously "denial," "grandiosity," "narcissism," or the "ego-self" (which the LAP has evidently banned as an approved "Higher Power"), and other psychological concepts engrafted or jerry-rigged onto the folk wisdom of AA in order to browbeat the questioning dissident into submission. Acceptance of the explanation of the 12-step theory requires no less than the suspension of rational analysis. Questioning is met by a phalanx of pithy one liners. "Your best thinking got you here." "You can't be too dumb to get the program, but you can be too smart." "Take the cotton out of your ears and put it in your mouth." "We will gladly refund your misery." etc. There is even the concept of the "dry drunk" which was put forward by the director in an article in *The Campbell Law Review*. This is the bizarre notion that one can be abstinent from alcohol, but is not "sober" if one is not working a good 12-step program.

Ordinarily all this would be an interesting object lesson on the power of myth, but until this year, the LAP Committee had the authority under certain circumstances to convey to the grievance committee information obtained through its authority to investigate anonymous complaints of substance abuse; to require an attorney under penalty of contempt to submit to a substance abuse evaluation; to initiate a grievance against an attorney; and to petition a Superior Court Judge to suspend an attorney's license.

Fortunately the council has approved the elimination of Rule .0614 which previously authorized the LAP to file grievances in what it called the "force-to-treatment" rule. This deletion of Rule .0614 puts real meaning into the LAP's assurances of confidentiality. The removal of this authority is a real substantive reform which will strengthen the LAP and enable it to have more credibility with lawyers, which is the key to its effectiveness.

The LAP Committee in an effort to protect the State Bar as a state agency from potential liability under the establishment clause has now adopted supplemental rules which say on paper that the LAP will not recommend a treatment option with an "*arguably*-religious aspect without *mentioning* that secular treatment options *may* also be available." In what manner and with what conviction this will be conveyed, given the beliefs of the LAP Director, remains to be seen. A drug dependent attorney is not in much of a position to provide a credible informed consent at the outset of his or her search for help. If the LAP does not accept at least the possibility of pluralism on the subject of the nature and treatment of addiction, then lawyers who need professional help will continue by and large to be served up ersatz religion with a passing nod to the establishment clause. A more hopeful sign is the recognition by the LAP that "ultimately a patient must believe in what his or her treatment or aftercare is about *or this treatment will not work.*"

The fact remains however that the program's PAL's logo remains the triangle enclosed in a circle, the international "recovery, unity, service" symbol of Alcoholics Anonymous, and despite receipt of information relative to the appellate decisions, and the other data set out in this article, the NCLAP website's mantra on disease, addic-

tion, and treatment has not been modified in three years. The site is replete with what are quite frankly some very peculiar apologetics on 12-steppism, and how that philosophy can be used to deal with addictions of all kinds including alcohol, drugs, nicotine, compulsive gambling, sex, spending, etc. Evidently all one needs to do is to take the "first step," (We admitted we were powerless over _____,) and fill in the blank. Hopefully these "steps" are not applied by the LAP to mental health issues like depression where admonitions that one is "powerless" and should suppress emotions like "anger" can be clinically harmful. There is even a "4th Step" form on the site where you can catalog your sins to assist you in taking the "fearless and searching moral inventory" required in Step 4.

So what needs to be done to help lawyers deal with and overcome substance abuse and at the same time protect the public? First, don't panic and throw up your hands. Statistically, natural remission without treatment for whatever reason is the most common outcome of substance abuse, particularly for well educated, middle class people. Second, lawyers needing or seeking help should be told the full story about the various approaches to addiction treatment and the disagreement within the scientific, medical, and psychological professions on the subject of addiction and abuse, and then allowed and encouraged to make a true informed consent to one of the variety of methods available to deal with the problem. (A brief intervention involving a couple of sessions and follow up with a medical doctor explaining the consequences of continued abuse has been shown to be among the most effective approaches.) Third, treatment programs should be tailored to the individual lawyer, not forcibly imposed through a one-size-fits-all mandate. The one constant in all modalities consistently shown to be effective is therapist *empathy*. Dr. Miller describes empathy as "skillful, active listening as opposed to a 'listen-to-me' authoritarian approach." Fourth, the State Bar has already taken steps to make the LAP a truly confidential diversion program which removes the cudgel from 12-step advocates, and establishes a firewall between the LAP and the grievance committee which is porous from committee to program, but impermeable from program to committee. If investigation reveals a substantive basis that an attorney has an addiction, and since most all treatment approaches require a period of abstinence, the public can be protected by insisting the attorney submit to regular and random urine screens. Attorneys must submit to random audits of their trust accounts. The principle is no different and would be just as effective in this context without tramping on the First Amendment or Section 13 of the North Carolina Declaration of Rights.

The State Bar and its LAP has the opportunity to significantly improve the ability to assist lawyers suffering from substance abuse, while protecting their First Amendment rights and their right to make an informed consent as to their treatment. I am confident that provided with enough credible information, a willingness to hear from a broad range of experts in the field, together with input from the membership, that the council will take advantage of this opportunity. While the issues discussed here might not affect you as a bar member directly, the fact remains that approximately $350,000.00 of your mandatory dues are appropriated annually by the council to fund the LAP. Since the State Bar is a state agency and bar employees are state employees, this is legally equivalent to tax money. You are required to attend LAP

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Share Your Thoughts and Ideas with the Bar

The Journal wants articles of interest to the legal community. Submit your work or suggestions for publication. Contact the editor at nchan@bellsouth.net

The Enigma in the Courthouse Stairs

By Candace Allred

The Results Are In!

In 2006 the Publications Committee of the State Bar sponsored its Fourth Annual Fiction Writing Competition. Eight submissions were received and judged by a panel of five committee members. A submission that earned third prize is published in this edition of the *Journal*. The second and first place stories will appear in the next two editions of the *Journal*, respectively.

Some people said Jessie Capewell had gotten where she was in life because of who she knew. At least it appeared that way. Her boss, the district attorney of Keokuk County, Sawyer Capewell, was her doting father-in-law. Jessie's mentor just happened to be the daughterless first lady of North Carolina. There were all the obvious signs she received preferential treatment. Sawyer steered the best cases her way and she was never burdened with the usual stint in juvenile or traffic court where other ADA's languished during their early careers. Jessie regularly prosecuted felonies to the frustration of her older and more experienced colleagues. Adding to their frustration was her near perfect conviction record.

In law school she had gained the adoration of the first lady, Claire Morrow, by winning several oratorical competitions and earning the only "A" Morrow gave out in her first year legal writing seminar. Two years of female bonding ensued as the pair embarked on Moot Court Competitions across the country, picking up trophies and downing a few frozen margaritas along the way. Morrow arranged a series of choice internships for Jessie beginning with a split summer between southeastern powerhouses, Teague & Lynch and Brown & Davies. Claire's influence culminated with a clerkship at the Fourth Circuit Court of Appeals, despite Jessie's sub par grades. Jessie repaid the favor by organizing a well attended golf tournament which raised thousands of dollars for the governor's election campaign.

Connections like these could take a young lawyer places. She could have gone anywhere, but the gravitational pull of her home town drew Jessie back to the small coastal community of Cantril, North Carolina. To be sure, Jessie was ambitious, all of her hard work and diligent social climbing had not been in vain. Her aspiration was to become a judge, to be a powerful somebody in the place that made her feel lowly since birth. And the sooner she became a judge, the better. Her desire was born from a promise she made to her ailing father many years back. It was a promise she was determined to keep.

Circumstances were ripe in Keokuk County for the governor to appoint a new judge to the district. Political pressure to fill Judge Hokely's seat with a jurist from his own party was mounting, though the old man proclaimed he would not step down until he was carried out of the courtroom on a stretcher. His stance angered Jessie and the other members of the local bar who hovered over his seat like vultures. If only he would step down, Jessie knew she would be a shoe in. Time was running out for her and it was unlikely she would ever have such connections to the governor's mansion again.

The judicial appointment weighed on Jessie's mind, but she tried not to let it distract her from her caseload. After all, loosing some easy drug cases would not bode well in her quest to become judge.

"Mr. Masser, like I said, all the state is willing to do is reduce the charge to felony possession," Jessie said with a stack of manila files bouncing on her hip and a patent leather attaché swinging from her grip. She strutted down the hall of the courthouse, her conservative black pumps clicking against the hard wood like the hooves of a show pony.

Jim Masser struggled with a response, but he was winded just trying to keep up with her rapid gait.

"My client had only 1.6 ounces on him, that's just one tenth away from making this thing a misdemeanor," his tan blazer billowing open as he tried to keep up.

"Well, that's his bad luck. I think you're forgetting some evidence tended to show he meant to share with his buddies. Felony possession is on the table until Monday afternoon. Just let me know," she said unrelenting in her stride.

Jessie used her quick pace to intimidate, it was a little trick she had picked up. Jessie could walk faster in pumps down halls and up stairs than any other attorney. Half of those old guys still smoked and nearly all of them sported middle aged guts. It left her in the position of barking out plea offers over her shoulder, while opposing counsel panted like whipped dogs. They were too proud to ask her to slow down.

"Look, he's never been convicted of anything remotely violent," Jim Masser groveled, "He's had a rough life Ms. Capewell."

Masser had to stop and take a breather. Jessie took mercy and swiveled around on her two inch heels to examine his haphazard dress. Masser's furrowed brow sprouted moisture. His suit was mismatched with too small

pants a lighter shade of Khaki than his blazer. The short sleeved dress shirt sticking to his torso crumpled in the humidity. Jessie's outfit remained crisp despite the sweltering August heat and the fact that she was wearing panty hose. Her mother told her that ladies always wore nylons, and no matter what the temperature, Jessie subscribed to that mantra.

"Then I am very sorry for him. But I won't hesitate to try this case," she added raising a well groomed eyebrow.

"I'm going to speak with Tom Capewell about this," he said in anger. He didn't really think anything would come of it, but he felt compelled to say something nasty. His client had been found with two separate baggies, and he knew Jessie could make a sale or delivery charge stick. Even though he had ten times the experience of Jessie, experience was no match for her relentless youthful stamina. She prepared longer, harder, and more diligently than any other attorney he had ever come across, and she lacked the bureaucratic complacency of other ADA's. *Damn Tom for assigning her to this case!*

"Do what you must," it was more important that Masser respect her than be her friend.

"Ms. Capewell! Ms. Capewell!" Jessie turned to the excited voice. Marjorie Freeman, a summer intern at the DA's office was running towards Jessie.

"What is it?" she asked bewilderedly, though not too concerned. Marjorie was an excitable young girl.

"There's an important phone call for you. It's… Claire Morrow."

Finally, Jessie thought, this was the phone call she had been waiting for, maybe the governor was going to force Judge Hokely's hand. Jessie shoved the files she had been carrying into Marjorie's chest and trotted down the hall with Marjorie following after.

"Like the Claire Morrow of Teague & Lynch, like Claire Morrow the governor's wife?" asked Marjorie.

"Yes, *the famous* Claire Morrow," Jessie said feeling a bit charitable at the sight of her doting intern. "Maybe I could introduce you when she comes to Cantril." And she would come to Cantril, for Jessie's swearing in, of course.

"Omigod, that would be awesome!" Marjorie said darting ahead of Jessie and opening the office door for her.

Jessie shooed her out of the room—this would be a private call. She took a deep breath and picked up the receiver.

"Professor Morrow, how are you?" her glossed lips parted with a knowing smile.

"Jessie, dear, are you going to call me that forever?" She laughed. "It's Claire, just plain Claire, how many times to I have to tell you?" Though she knew Jessie would never call her by her first name, and she really didn't want her to, both women were too fond of decorum.

"How are your boys?" The conversation should begin with pleasantries—Claire would get to the point soon enough, best not to appear too needy Jessie thought.

"Stephen is actually out your way, he's sailing up the coast on a schooner with some friends. And Joseph, like most 14 year olds has discovered girls. The governor's up to his eyeballs in commitments for campaign season. So, I guess you must know why I am calling," she said, her voice trailing off in a sing-songy manner.

Jessie could hardly contain herself and began twirling a tight clasped pony tail around her thin finger.

"It's always nice to hear from you Professor Morrow, is there any way I can be of assistance to the governor?" she inquired coyly.

"Thank goodness, I knew you wouldn't make me beg. With fundraising season underway, we hope you could organize that wonderful golf tournament again. This year we'd love to have a reception at your father-in-law's river house. How does that sound dear?" Jessie felt somewhat dejected, but she knew in politics a price must be paid for favors.

"The Capewell family would love to help. Actually, Luke and I are living at the river house now. My in-laws moved into a condo last year by the coast. They thought we'd be able to better care for the place."

Jessie's eyes drifted to the glossy photograph on her desk, the one Claire had given her. It was of the two of them slouched like dressed up rag dolls on the grand staircase of the governor's mansion. The picture was taken after the Governor's Ball three years earlier. Claire was so well preserved for her age, it appeared the two were blond sisters, though Jessie was 20 years her junior.

A short pause hung in the air as Jessie waited for a response. None came, so Jessie took her shot.

"Has the governor given any thought to Judge Hokely situation? Things have sort of deteriorated, he rambles on so. In traffic court the other day, he gave a sermon that went on for over an hour. Something about when he was at Okinawa, blah, blah, blah…"

"Yes, several attorneys from the area have called to air their concerns," Claire offered.

"His wife told one of the clerks that Judge Hokely had never even served in the South Pacific. Besides, even as old as he is, he's too young to be a WWII vet. He's losing his mind for sure. I don't mean any disrespect, the man's a legend around here, but we can't get through the calendar with these outbursts and his three hour lunches," Jessie lamented.

"That's a shame, he used to be so on top of things," Claire sighed.

"It's more than just a shame. Judge Hokely's antics are gaining notoriety, and not in a good way. Yet he insists he'll run for another term. Times are different now, what was once considered charming or idiosyncratic behavior is hindering the court. Judge Hokely is a dinosaur and bad for the party. He is leaving the door wide open for those with different political affiliations to launch successful campaigns. But if someone from the party were already on the bench..."

"You're right and the governor realizes these things, but he can't very well force someone to step down."

"The governor is the most powerful politician in the state, surely there are ways to apply pressure," Jessie argued knowing how much both the Morrows enjoyed being reminded of how powerful they were.

"Now Jessie dear, you know the governor doesn't operate that way." Jessie's throat tightened, she thought to herself *that's exactly the way the governor operates.*

"I know you want to be a judge," Claire softened her tone, knowing her words wounded the ambitious protégé, "and no one would like seeing a young woman put on the bench more than me. But you're only 30 years old, you have some time. Look, why don't you come to Raleigh and let me set you up in something here. Do you know what a fabulous lobbyist you would be? You would make the biggest splash up here in Raleigh, earn ten times what you're making in... wherever it is you are exactly. The governor even has connections in Washington, DC. You could go there. Dear, why are you wasting your talent in that little town you seem to be stuck in?" Claire stopped with the niceties and started getting frank.

"But I want this. I want," she took a breath, her eyes welling up, "to be a judge in Keokuk County. Like you said, I've sacrificed

a lot to be here." Jessie rarely let her emotions get the best of her, but this was the best shot she had. Claire was wrong, time was limited for Jessie.

"My advice is to think about the alternatives I'm offering. Your talents would be better spent elsewhere. Judge Hokely was elected to his post, we have to respect that. No one can force him down. Only the hand of God can pull that man off the bench."

* * *

It wasn't often Jessie left work early, so it shocked her husband when she came bursting through the door at three p.m. with tracks of mascara running down her cheeks.

"Jessie, baby, what in the world?" he was naturally distressed at seeing his usually impeccable wife strung out. She held up her palm to him to prevent him from coming nearer.

"I don't want to talk, just meet me out on the dock with a highball, a stiff highball." Luke Capewell wasn't good for a lot of things, but he made a superb highball. Of course he was already home on a Friday afternoon, readying his fishing boat for the weekend. Competitive fishing was the other thing he was good at, though his chosen profession was part-time dentist.

As ordered, Luke rushed out in his deck shoes and golf shirt to his ruined wife. He believed the situation warranted a pitcher of highballs.

"Sugar, now I know you didn't lose a case," he said divvying out liquid into a plastic cup. Jessie was perched on the edge of a white Adirondack chair staring intensely into the river.

"No, it's nothing like that. Claire Morrow called today to ask about hosting the golf tournament again. I thought the governor wanted to appoint me to Judge Hokely's seat, but she said the governor is not going to force him to step down," Jessie gulped a healthy dose of cocktail. "The old loon was boasting in court the other day, he would stay until they carried him out on a stretcher."

"Jess, I can't believe you're all worked up about that. It will happen, sugar, soon enough you'll do it. You're only 30 for crying out loud. Besides…this will give you more time to concentrate on a baby," he said tenderly rubbing her tensed thigh.

"Oh please, if I devote half the time to child rearing as the other judges do to golf our kids will be fine. The problem with this place is that everyone's scared to death a woman might get a little power," Jessie sounded bitter but, Keokuk County was one of the few jurisdictions in the state that had never elected a female judge or district attorney to office.

Luke hugged Jessie from behind peppering the back of her neck with little kisses.

"It's so nice out. How about I whip us up a plate of shrimp scampi and some of those little red potatoes you like. We could take dinner out on the boat with another pitcher of these," he offered holding up a half empty glass.

"Whatever, but just so you know, that's not going to fix things. Should I ask your dad to call Governor Morrow? No, wait, that's too obvious. I'll enlist Judge Buckman, he's got some pull in the party doesn't he?" she said looking up, but Luke had already retreated to the kitchen.

Jessie pulled out her cell phone. It was time for the most dreaded part of her day.

"Hey Momma, it's me. How's Daddy?" she asked. Jessie would have liked to stop by on her way home, but since things had gotten really bad, her dad refused to see her. He was too proud to let his children see the sickly skeletal frame that remained of their father's once robust body.

"Not too good. The Hospice nurse came by to give him some pain killers. Maybe you should come in the morning…." Her mother's voice cracked under the strain of tears. "Look sweetie, I better go, I hear him coughing."

"OK Momma, I'll see you in the morning. Take…" but her mother had already hung up before she could finish, "…care of yourself."

Jessie balled up her fists and stared defiantly at the river. Undoubtedly, the cancer was a result of the sawdust he breathed year in and year out as a laborer in the local paper mill. The oppressive Weiner Paper Mill made millionaires of a few local townspeople, including her husband's ancestors, while keeping everyone else in dead-end jobs. Not to mention, the mill made the county filthy with its raw repulsive smell.

"Jessie, you be sure and get your education, so you don't end up like your dad," he told her the night before his first surgery.

"Yes sir. I'm going to be an attorney," she'd said proudly.

"But why stop there? You should go all the way and be a judge. There's no higher calling in this world greater than being a judge. Everyone respects a judge from the lowliest mill worker to the richest man in town. They're all at the mercy of a judge. That's my dream, to see my baby Jessie in a black robe one day pounding her gavel," he grinned.

"If that's your dream, then it's my dream too," she'd told him combing sweaty tendrils out of his eyes.

"Promise you'll do it, that you'll get your education and be a judge one day," he pleaded.

"I promise."

Jessie's father survived his first bout with cancer. She was thankful for the good times that followed He'd been able to attend graduations and give Jessie away on her wedding day. He boasted to everyone that would listen, his little girl was going to be a judge. Even when people scoffed at his overalls and his grimy working man's hands, he'd kept faithful. The cancer came back last year and took a vengeful turn on him. Jessie knew he did not have much time left, if only she could be appointed judge before he passed on.

Luke emerged with two hot plates fragrant with garlic and butter. They decided to dine on the dock instead of their boat. Jessie did not feel much like eating, but she did not want to appear ungrateful to her husband. He had been taking the brunt of some undeserved abuse lately. She sat with her tan legs swinging from the side of the dock, kicking up tiny splashes of water. The river grew darker as the sun disappeared, until, at length, it was nearly black. Luke did not pressure her to talk, he knew from experience to just let Jessie be lost in her own thoughts. Eventually she'd come back to him.

* * *

Like other rural courthouses in North Carolina, Keokuk County had fallen into disrepair. During summer months the building hummed like a bee hive because every lady in the Clerk's Office brought her own fan to work. For years rumors circulated that the building would eventually be air conditioned. Unfortunately, the better part of the budget had been spent on costly metal detectors. The fire marshal warned that the antiquated electric wiring system would not support a portable fan plugged into every available socket in the building, but the staff refused to heed the warning.

Periodically the lights would flicker under the strain and occasionally the wires would

short. The courthouse might lose power for a minute or two, but eventually things would come back up.

On one such morning, a few days after the devastating phone call from Claire Morrow, Jessie found herself in district court. Normally she spent working hours prepping for felony trials in Superior Court, but the district attorney asked her to straighten out the calendar mess in traffic court while her incompetent district court counterpart ADA was on vacation. As requested, Jessie and Marjorie arrived early and negotiated the entire criminal docket. By the time 9:15 rolled around only a few stragglers remained. If only Judge Hokely would favor the court with his appearance, the calendar could be cleared and everyone could move on with the day.

"Where's the judge?" Jessie inquired to a plump clerk who was nose deep in a trashy romance novel.

The clerk did not reply but pointed upward to Judge Hokely's chambers. No doubt he was upstairs leisurely perusing the local paper or perhaps watching a morning chat show on television.

"Well can you get him and tell him we're ready?" she said pulling her lips taught across her teeth in a sort of condescending smile.

"I suppose I could," the clerk said peering over the top of her paperback. She proceeded to rise from her chair slower than any human being Jessie had ever seen.

"I don't have all day. I'll get him myself," she said tearing off across the gallery.

* * *

As predicted, Jessie discovered Judge Hokely planted in front of his television with the daily crossword puzzle resting on his lap. Jessie tapped on the judge's open door.

"What is a six letter word for mystery, fourth letter is a 'g'?" he asked without looking up.

"Judge Hokely, everyone is waiting for you. Are you ready to come down?"

"Just a minute. I've only got a couple more. Six letter word for mystery, do you know what it is?" he said peering over his glasses.

"Enigma, a six letter word for mystery is 'enigma.' Now, let's go Judge Hokely, we don't want to keep people waiting," Jessie said in a way one might speak to a toddler. The lights flickered on and off, but Jessie and the judge barely acknowledged it.

"Enigma, I never would have gotten it," he said rising from his chair. "You're Tom Capewell's daughter-in-law, pity I don't get to have you in my courtroom. You're clever aren't you, and purdy as a picture," he said winking at her.

"We really need to get downstairs. I'm trying to clear the calendar. Things are getting a little backed up." Jessie was relieved Judge Hokely had gotten up from his chair, but perturbed by the "purdy" comment.

As the two approached the elevator, the power went off, but did not flicker back on immediately.

"We better take the stairs, judge. We don't want to get stuck in the elevator if the power goes out."

Nothing in the world sounded better to Judge Hokely than being stranded all day in an elevator with an attractive young blond. While his mind drifted to that particular fantasy his eyes drifted to Jessie's posterior. They stopped at the landing and the lights flickered off again, this time they stayed off for a moment. The judge's hand then drifted where his eyes had been, just briefly, a nice little pat. He had perfected the move over the years; just enough for him to get his jollies, but too little of an indiscretion for anyone to articulate a viable complaint.

"Look, you dirty old man," Jessie said grabbing the offending hand. "What do you think you're doing? Keep your hands to….."

The judge was clearly startled—he had never gotten this reaction before. Then, in the dark, at the top of the staircase, it all came together for her. Jessie felt her own power, felt the frailty of the old man teetering on the landing. His bony wrists tensed in her grip, he opened his mouth like he might say something, but no words came out. The injustice of the speechless man standing in the way of her dream was too much. Who was he to deny her the judgeship she and her sweet father had dreamed of together?

Jessie winced and closed her eyes dreading the gruesome scene, but things weren't as gory as she imagined. No spattering of blood and guts polluted the stairwell. The judge's arms and legs weren't twisted in any unnatural fashion, the way she feared his limbs might be rearranged from the violent fall. Only his neck appeared crooked, as if it had collapsed onto his left shoulder in a deep shrug. Judge Hokely had not even screamed, only a dull clunking sound was made as his head hit the first floor landing.

The lone haunting image that Jessie would carry with her from that day forward was the terrified look in the judge's opened eyes. Those eyes, frozen in their final frame, created the sorrowful and maddening expression of a man who had been done in by his own silly indiscretions.

* * *

In the end, the hens in the Clerk's Office took the brunt of the blame for Judge Hokely's untimely demise, but most people dismissed the incident as a freak accident. Even the judge's family did not feel particularly bitter about the fall. His son remarked at the funeral service, that it was somehow fitting the good Lord had taken his daddy in the courthouse, the place the judge loved most. Jessie's father-in-law used the incident as leverage to get the legislature to approve more funds for courthouse renovations. By the following August an HVAC system had been installed, all in honor of the late Judge Hokely.

The morning of Jessie's swearing in, her family assembled at the river house for a celebratory brunch. As a little gift, Claire Morrow had arranged to have the gathering catered by some fancy outfit from Raleigh she employed for her ladies' luncheons. The gesture delighted her mother and father, who mustered enough strength to attend the festivities for what was likely his final outing.

Getting up to leave, Jessie pulled on her new robe and could not help noticing it fit her perfectly; black was her color. Today she would become a judge in front of her father. He would leave this world peacefully, satisfied that Jessie had made something of herself. No longer was she just the daughter of a down and out mill worker, she was arguably the most powerful woman in the county. Jessie smiled at the determined face in the mirror. Maybe she wasn't the smartest or most gifted attorney, maybe she was not as sophisticated as the other girls in her law class, maybe she had to play a little dirty, but those things didn't matter. She had succeeded on her own. By the time she reached the bench, she was adept at shoving her way to the top. ■

Candace practices law in Chapel Hill in the area of estate planning. She lives in Cary with her husband and they are expecting their first baby in March. She dreams about one day writing and publishing a novel.

An Interview with Our New President—Steven D. Michael

Q: What you can tell us about your roots?

I was born in Lexington, North Carolina, but my family moved to Winston-Salem in 1958, where I grew up, graduating from Reynolds High School in 1967. I was the middle of three children and grew up in a family where both parents worked long hours, which meant that you learned to be self-reliant. I mowed yards and did odd jobs for neighbors in junior high school to earn spending money, and in high school I held part-time jobs to finance my social life and have money for college.

Q: When and how did you decide to become a lawyer?

I attended East Carolina University and was not considering becoming a lawyer even though that was the career my father thought I should pursue. I had a period of active military duty coming up after graduation and had been accepted by Duke University for graduate school for the fall of 1972. During my active duty time, I came to realize that a law degree could open a lot more opportunities for the future and came home one weekend to take the LSAT. I hand carried my application to Chapel Hill in the spring of 1972, and shortly thereafter received notification that I was invited to join what would become the class of 1975. I would be less than candid if I did not admit that I was not really committed to being a lawyer during my first two years of law school. It was not until I worked for Raleigh lawyer, William G. "Buck" Ransdell, during the summer after my second year that I really understood what lawyers did and the difference they made. I worked on an appeal of two death sentences that had been imposed on a man from the western part of the state and spent the summer researching and working on the brief. By the time I had finished, I was able to tell Buck that I believed that the client should and would get a new trial. The North Carolina Supreme Court granted the new trial. I continued to work for Buck part time during my third year of law school on a number of interesting cases involving prominent individuals from Wake County. Besides possessing a keen intellect, Buck was honest, professional, cared about his clients, and was a zealous advocate on their behalf. He, as much as anyone, cemented my desire to be a lawyer and provided the early guidance that has benefitted me throughout the years.

Q: What is your practice like now and how did it evolve?

My practice today is principally mediation, arbitration, and general civil litigation. After law school, I worked for Ransdell & Ransdell for two years essentially supporting the firm's trial practice, but also handling a number of matters on my own. I wanted to get more trial experience and though it was hard to leave two lawyers who treated me very well, I became an assistant district attorney in Wake County and prosecuted criminal cases for the next three years. When I was ready to leave, an opportunity to do trial work for a firm on the Outer Banks of North Carolina became available. I have been on the Outer Banks since 1981, forming the firm I presently practice with in 1984, and have continuously practiced with the firm except for a period in 1991 and 1992 when I served as a Superior Court Judge.

Q: If you had not chosen to become a lawyer, what do you think you would have done for a living?

Had I not become a lawyer, I unquestionably would have gone into the teaching field. During my second year of undergraduate school, it became my goal to teach at the college level. If not for the military duty time, I likely would have continued on that path.

Q: How and why did you become involved in State Bar work?

A letter to the editor in our local newspaper criticizing attorneys and the legal system made me angry and I decided that I wanted to be a State Bar Councilor so I could help improve the image of the profession. I have discovered what a big task this is and I hope to be able to use this year to continue to work on how the public views us.

Q: What has your experience on the council been like and how has it differed from what you anticipated?

I really did not have more than a general

idea of how the State Bar operated when I arrived. When I attended my first quarterly meeting, I was quickly impressed that this was a professional organization in all respects, doing very serious business. The level of professionalism, civility, and debate was impressive. One of the officers told my group of new councilors that we would make friends we would keep for life, and that has been true. It is without a doubt one of the most rewarding periods of time in my life and has made me a better lawyer and person.

Q: You live in a relatively small community on the coast, near Virginia, that is far removed from Raleigh. Does geographic diversity on the council really matter?

While all lawyers share many common concerns, there has long been a perception in more rural parts of the state that the State Bar is controlled by the big firms and not concerned about the problems of small town lawyers. That is simply not the case and the councilors adequately represent all segments of the legal community. Maintaining geographic diversity insures that all the lawyers of the state feel like their views are represented.

Q: In your opinion, does it make sense for lawyers to be regulating themselves? Is it good public policy? Do we deserve the public's trust?

I honestly believe that lawyers are their own toughest critics and are the ones most likely to impose upon themselves rules that protect the public. It has been my own experience in my 11 years with the State Bar Council that the councilors are able to put aside their self interest and the interest of lawyers when it conflicts with public interest. During the last few years, not only have we opened our disciplinary process to public scrutiny, but we have also made a tremendous amount of information concerning the activities of the State Bar and the disciplinary proceedings against lawyers easily available to the public, particularly on our website. As long as we continue to follow the principal that our decisions must be in the public interest, then we earn and deserve the public's trust.

Q: You've had a great deal of experience with the Bar's disciplinary program. How do you think it's working? Is there anything about it you'd like to see changed?

It is no secret that my emphasis this year will be on the disciplinary process. I am in the process of appointing a Disciplinary Advisory Committee to help with a smooth transition with our new chief counsel. I have no significant concerns about how our disciplinary process currently works and do not start with the idea that something is wrong. I want to see if there are ways to improve the process, such as speeding it up without comprising the quality of work and decision making. It is my hope that the Disciplinary Advisory Committee and State Bar staff will be able to come up with some bench marks to use as goals for the disciplinary process to move through. Every case is different and should be treated accordingly. However, we need to ensure that we move matters quickly through the process because lawyers, clients, and the public all have an interest in having the matter concluded in a timely fashion. I see no major changes being necessary, but simply look towards a more formalized plan to aid the process.

Q: Do you think there ought to be a "statute" of limitations applicable to grievances?

In light of the Disciplinary Hearing Commission's decision in the Honeycutt and Brewer matter, which the State Bar has appealed, we have undertaken a study of whether or not there ought to be a "statute" of limitations. There has been a proposal offered by a special sub-committee, which in essence does away with our current statute of limitations. I personally prefer to have a statute of limitations similar to the one that we currently have in force. It makes sense that there has to be a time when grievances, other than felonious, criminal misconduct, are simply too old to be dealt with. I think Tom Lunsford's humorous article in an earlier State Bar *Journal* (Summer 2006) clearly illustrates the difficulty inherent in trying to reconstruct events that are remote in time. We have tabled further discussion of the current proposal until we have a decision by the North Carolina Court of Appeals.

Q: The council is currently considering whether the State Bar ought to accept responsibility for providing and paying for counsel for indigent lawyers charged with disciplinary offenses or alleged to be incapacitated by some sort of emotional or mental disability. How do you feel about that?

I favor providing counsel for attorneys alleged to be disabled by some sort of emotional or mental disability and think our rules currently allow the DHC Hearing Committee to do this if justice requires. However, indigent lawyers present a totally different question. It is a difficult issue because of the serious consequences that may befall the attorney; however, I do not support the proposal. I cannot support the proposal. Using an extreme example, it would be difficult for me to justify to the lawyers of North Carolina that we would take a portion of their dues to provide a legal defense in a disciplinary proceeding for an attorney who has embezzled his client's funds and spent them. We all already pay a Client Security Fund assessment that may cover the loss to the client occasioned by the attorney's misconduct.

Q: Over the past several years, the State Bar has spent increasing amounts of its budget to enforce the prohibitions against unauthorized practice of law and to assist lawyers who have become or are becoming impaired by chemical dependency and/or mental illness. Are these trends likely to continue?

When I first came to the State Bar Council 11 years ago, I was assigned to what was then known as the Unauthorized Practice of Law Committee and we did not seem to have a lot to do. I served on the committee for nine years and, during those years, I watched the explosive growth of complaints to the committee about individuals and companies involved in the unauthorized practice of law and the harm they cause to the public. There is no question that this will continue to be an area of increasing concern as we attempt to protect the public from unlicensed and unregulated vendors who do significant harm. Besides those who actually set up shop, the internet provides an unlimited ability for individuals from anywhere in the world to offer services to North Carolina residents

and this will likely continue to grow.

It is unfortunate that the number of lawyers with chemical dependency and/or mental illness also tends to increase with the growth of the group of lawyers which we serve. Despite the large amount of resources devoted to these issues by government, private groups, and the State Bar, it seems likely that as our membership grows, these problems will grow proportionately. Our current program administered by Don Carroll does a terrific job; however, at some point we will have to decide how much more of the State Bar's limited resources can be devoted to this and may need to consider using alternatives and referrals outside the State Bar.

Q: You were a leading advocate for the imposition of a requirement that lawyers appearing pro hac vice in North Carolina tribunals be registered with the State Bar. Why did you feel so strongly about that and do you think the rule is going to be effective?

For years, lawyers from other states have been allowed to practice on a limited basis in the courts of North Carolina. In doing so, they have agreed to be subject to and bound by our rules. Unfortunately, we had no way of knowing who they were, where they had been admitted, and the matters in which they had been admitted. Since they are subject to our regulation, I felt that the State Bar should have a record of these individuals in the event we had to have some interaction with them. I think that when we started the process, we had guessed that there might be 200 pro hac vice admissions per year. There is a $25.00 fee that is collected for each pro hac vice admission and through the third quarter of this year, we have collected a little over $11,000.00 in fees, which translates to approximately 450 pro hac vice admissions. It is obviously occurring in greater frequency than we anticipated. The form which has to be completed also contains a gentle reminder for out-of-state attorneys working in North Carolina that they need to check with their tax advisors as to whether or not they owe any income tax to the state of North Carolina. I believe the rule is effective as it appears compliance is high and we now have a record of the out-of-state attorneys subject to our regulation.

With his wife, Loretta, looking on, Steve Michael is sworn in as president of the State Bar by Chief Justice Sarah Parker

Q: What else would you like to accomplish during your year as president?

I will use my year to support professionalism and civility among the members of our profession and to encourage lawyers to be active not only in the organized bars, but also in their communities. I will ask the district bars and the Bar Leadership Institute of the North Carolina Bar Association to consider the issue of ethnic and gender diversity, and to encourage young, talented, minority lawyers to get involved in the State Bar and the North Carolina Bar Association. I will also continue to participate in the programs that we put on for the district bars to give local lawyers an opportunity to put faces with the names of State Bar staff members so that they will feel more comfortable in calling on them for advice. It is extremely important for lawyers to understand that the State Bar staff is first and foremost here to help them avoid problems.

Q: Tell us a little about your family.

Loretta and I have been married for over 36 years and she is my biggest supporter and my kindest critic. I think all of my fellow councilors and officers who have gotten to know her understand what a capable and valuable asset she is. We have two sons, both of whom are married. My youngest son Josh and his wife Claire live in Durham, and Josh attends UNC. Our oldest son Kevin and his wife Lora live in Summerfield, North Carolina, and have given us two grandchildren, Zack who is six and Brooke who is four.

Q: What do you enjoy doing when you are not practicing law or working for the State Bar?

First and foremost is the enjoyment I get from being with my family. We are a very close knit group and see each other often. As any one of them will tell you, I am completely taken with my grandchildren and enjoy spending as much time with them as I can. Outside of family, I enjoy traveling, amateur photography, and being the home and office handyman. ■

Q: How would you like to be remembered by the next generation of lawyers?

I hope that they will know me well enough to remember me as a friend and as a good lawyer with a sense of humor. ■

The Judicial District Bar Professionalism Program

By Melvin F. Wright Jr.

The Judicial District Bar Professionalism Program (JDBPP) was formed in response to a need for lawyers to celebrate the practice of law. Too often, our profession is the butt of tasteless jokes, the subject of media attacks, public distrust, and contempt, and the storyline for outrageous TV shows, movies, and novels. How often do we get to sit around and enjoy the camaraderie of other members of the legal profession? To talk about all the good things that makes our profession great? To touch the very fabric of the patchwork that brought us to it? To share war stories with one another, laugh about something that happened in court, or help each other resolve a complex situation—whether personal or professional?

When was the last time we were able to look at our profession, our colleagues, and ourselves and be proud of what we do, what we stand for, and the fact that we are indeed assets to our communities?

How well do you know the other members of your bar? Do you know who in your bar actually played shortstop for the AAA Mets in 1963? Do you know who in your bar took a now famous Hollywood actress to the prom? Do you know who in your bar holds the NCAA record for the three-mile run?

There is no doubt that within our profession, and within all professions, a few bad apples reside. They do things that make our skin crawl. They do things that appall us, even scare us and give us all a bad name. Rather than combat it, or do something to counter the ill image presented to the public, we have allowed it to define our profession. That is an unfortunate resignation. One way to fix our image problem is to remember why we came to this profession and to once again know each other as colleagues and even adversaries—but not as enemies.

The charge of the Chief Justice's Commission on Professionalism (CJCP) is to enhance professionalism among North Carolina judges, lawyers, and law students. In conjunction with Lawyer's Mutual Liability Insurance Company, the CJCP has implemented the Judicial District Bar Professionalism Program. Developed with basic requirements for the 3.0 hours of ethics/professional responsibility CLE credit and the local Bar's desires and needs, the program is designed by and for the local Bar, focusing on local professionalism issues, stories, and humor.

Lawyer's Mutual provides notebooks and CDs for each attendee and also helps sponsor a meal. The CJCP sponsors the CLE credit and also contributes toward the meal, so that everyone in attendance receives free credit and a free meal. In addition, either the chief justice of the Supreme Court or the chief judge of the court of appeals attends and addresses the attendees as a keynote speaker. The CLE portion of the program lasts approximately one half day.

The programs are best attended when they have the active support of both district and Superior Court judges and the district attorney, as well as their participation. The chief district court judge and the senior resident Superior Court judge will typically cancel court for either the afternoon or the entire day so that all lawyers can attend and participate.

Since beginning this effort with the 27B Judicial District in Shelby in 2003, the CJCP has sponsored 18 district and/or county bar programs around the state. If your local bar would like to schedule a program for 2007, please call the CJCP at 919-571-4762. ■

Melvin F. Wright Jr. is the executive director of the Chief Justice's Commission on Professionalism.

The Mind Reasons, The Heart Knows

By Don Carroll

"The Pueblo Indians told me that all Americans are crazy and of course I was somewhat astonished and asked them why. They said, 'Well, they say they think in their heads. No sound man thinks in his head. We think in the heart.'"
Carl Jung

My daughter will be starting law school next week. I have not tried to persuade her to go or not go to law school. She has been involved in teaching English as a second language in a tough inner city school system for the past two years and I think that her desire to go to law school is due to the inequities she saw in the educational system and the gap between the rhetoric and reality in secondary education. I have not given her a copy of *Making Docile Lawyers: An Essay on the Pacification of Law Students*, 11Harv. L. Rev. 2027(1998) an essay that describes law students beginning with enthusiasm and desire to make positive changes for clients and society, then quickly becoming "demoralized, dispirited, and profoundly disengaged." Or referred her to *The Role of Legal Education in Producing Psychological Distress among Law Students and Lawyers*, 1986 Am. B. Found. Res. J. 225 (1986), which documents an increase from 20% to 40% in the level of depressive symptoms between the first and third year of law school. But now that her decision has been made, and she is beginning the training to become a lawyer, it seems that the father's duty to give advice and guidance, free of the burden of parental pressure, can be appropriately discharged. With her permission, I share with you my letter to my daughter about becoming a lawyer.

Dear Nora,

Thanks for including some time in your summer schedule for us to be on vacation. I thoroughly enjoyed our time together and our conversations. We talked about your upcoming experience of law school, and I want to try to more adequately share with you my thoughts. They are the result of my experience. Yours will be different. My experience reflects a wonderfully stimulating and enjoyable law school experience, and it also reflects many hours spent talking in confidence with hundreds of lawyers about their law school experiences, where things went right and where they didn't.

I am convinced that what law schools have traditionally done best—teach students to read and understand cases, analyze problems, and write logical and precise arguments—are right up your alley. You will find the analytical side of law school both challenging and rewarding. Your decision to go to law school reflects the fact that you have natural gifts for some of these core lawyer activities. So first and foremost, I hope you will enjoy the rich intellectual challenge you will find at law school and the sharpening of your own inchoate lawyer skills in the process. There is something vital about being good at something in this life, and being at home with and skillful in the lawyer's traditional tasks is a wonderful thing that should never be diminished.

At the same time, I must tell you that these skills alone are not enough—not enough to bring happiness as either a law student or lawyer. While lawyer IQ is important, just as important is lawyer emotional intelligence. This is not a problem just for lawyers, but maybe we are more susceptible. Here is a poetic look at the limitations of mind:

This entity I call my mind, this hive of restlessness,
this wedge of want my mind calls self,
this self which doubts so much and which keeps reaching,
keeps referring, keeps aspiring, longing, towards some state
from which ambiguity would be banished, uncertainty expunged;
From "The Clause" by C.K. Williams found in The Singing

You will learn a lot about how our laws are crafted to bring justice in criminal law—to society, the victim, and the perpetrator. You will learn about justice in domestic disputes

and fairness in the tax code. But there will be no courses at law school on mercy. And although we always think of justice and mercy as going in tandem, those intangible qualities involved in mercy that relate to emotional intelligence are not generally taught in law schools.

Psychologists writing in the field of emotional intelligence suggest that emotional intelligence is an innate ability to feel emotion—one's own and others—and to remember, regulate, learn from, enjoy, and use this information. A distinction is sometimes made between one's innate emotional ability and learned emotional skills. The nurturing or non-nurturing environment for healthy emotional intelligence is a big factor in the degree to which skillfulness is learned; of course in childhood, but also later including the law school years. A child growing up in an abusive, neglectful home (or even one where love is present but showing emotions is discouraged) is going to have a low level of emotional skill even if the child's innate emotional intelligence is high.

Recently, someone with whom I have worked on the issue of denial of his tremendous emotional intelligence told me:

> In hindsight I did not respect my emotional self. I pooh-poohed it as getting in the way. I saw my mother's emotional side as childish, angry, loud, and uncontrolled, and so I saw emotions as an ineffective means of communication and understanding myself. Giving my emotional self an equal seat at the table has been a radical idea. I am still a thinker first, but now when I look at a new situation, I not only

think about it, but also ask myself how it feels. My feelings in turn get me in touch with who I am. My decisions then more authentically reflect who I am. I am more the participant in my life and less the observer.

Intellectual intelligence and emotional intelligence, just like justice and mercy, are not mutually exclusive; in fact, they complement each other. However, the focus just on intellectual intelligence in law school has often led to an atrophy of emotional intelligence. When emotional intelligence does not continue to be developed, then there is the loss of that sense of identity of who one is as a person, and the concomitant loss of values the person has.

What transforms knowledge to wisdom is a deeper process that includes our emotional intelligence. Wisdom does not come just from reading a law book or analysis. Rather it comes from several other sources. One of these is learning that is combined with experience; experience that allows one to actually see things from another point of view, or from a perspective outside of one's ordinary viewpoint. To paraphrase Nietzsche, "Convictions are greater enemies of the truth than lies." Wisdom is what allows us to become more open minded, less in need of the security of dogmatic truth (a belief that this is only what the law is) and at the same time more centered in our own personal truth. These goals of openness and centeredness seem opposed, but paradoxically strengthen each other—without me truly understanding and believing what I think is moral, just, and merciful, it is hard for me to be truly open to someone else's view.

Wisdom has also traditionally been understood to come from thinking that occurs at a deeper level than analytical thinking. In the Middle Ages, thinking was not a narrow, reduced, and circumscribed material brain-bound capacity as it is most often in our contemporary world. Rather, thinking was about grasping living realities directly. This kind of thinking was not self oriented, but turned toward the service of something larger. Specific practices evolved in the monastic tradition for being able to read, understand, and think with the heart, not just the mind. This is not something you will find in law school. It is rarely available in our culture. Rather, just the opposite. Our culture, through marketing and advertising, is all about giving us images, virtual realities. These may give us information, but certainly not wisdom. Our creative longing, our second level thinking—where our emotional intelligence and our values want to take us—is not facts or advertisements about beauty, truth, or great leadership; but rather it is to experience and embody truth, beauty, justice, and mercy. Wisdom is about such embodied knowledge.

Descartes is probably where history pinpoints this change in the perspective of how one thinks. Maybe it was the loss of his mother in childbirth that drove him to cling to analytical thinking as a way to have identity—"I think therefore I am." The older perspective by contrast might be "I am because God thinks me." This less ego-centered perspective is where the deeper level of thinking occurs that leads to embodied knowledge. It is the difference between reading to acquire knowledge and reading to enter life in a different way. Karen Armstrong, arguably one of the most important commentators on religion alive today, talks about this in her book *The Great Transformation.* Her book is about that period in history that saw the founding of the world's great religions. She points out that, in that age, the belief was that neither thinking alone, nor feeling by itself, constituted the deepest self of the human being. Rather, thinking with the head and heart together took truth to a deeper level.

Plato described two different ways of approaching truth—logos, a scientific, discursive, and logical way, and mythos, a more silent, intuitive way of looking at reality. To have both and bring both together is to gain wisdom. Armstrong's critique is that in the western Christian world we place too much emphasis on thinking certain beliefs. Law school can carry the basis for her critique to an even further extreme. She argues that what the sages of religious transformation did was discover the second order of thinking that brings together logos and mythos.

Socrates is famous because he was able to make a person realize that what they thought was true was not. He demonstrated that analytical thought can do a lot of things, but that above all it ends in unknowing. Say you were a soldier and thought you understood from the battlefield what courage was. Socrates could take you through a series of questions and you would come out realizing you knew nothing about courage. The purpose of this intellectual exercise by Socrates was not to make you look bad, but to give you an experience that revealed the possibility of even greater knowledge at another deeper level of thinking. It was the same kind of experience that the koan is used for in Zen Buddhism. The embodied knowledge is realized not just from the questions or the koan, but also because of the experience of wisdom of the teacher. When you get called on in class, in what purports to be the Socratic method, it will be about whether you have read and understood the case, not whether or not your analysis has gone to the end of where intellectual analysis can go and so opened you up to a whole new level of understanding. This second level is the meaning you get in poetry that goes to a much deeper place than what the words literally say.

So what does this mean to a first year law student? All of those traditions that explore and illuminate the way to greater levels of knowing point out that the mind itself, reading these words, is not the way to understand.

"Which of you by taking thought can add one cubit unto his stature?"[1]

"The Tao that can be told is not the eternal Tao."[2]

In other words, there is no self-help book knowledge available to go where I hope this letter points—because this letter is simply the medium of traditional discursive thought. There is no formula. What might be the path for one person with a particular analytical and emotional intelligence might be a roadblock for another.

So with that *caveat* here are a few suggestions.

1. Try to stay conscious of who you are. Consciousness involves awareness, memory, and attention. The key to consciousness somehow seems to be to be aware bodily, emotionally and mentally of self, and, at the same time you have self awareness, to have an awareness of the world. The degree of consciousness fluctuates constantly, but strive for it as much as you can. We handicap ourselves if we are only in our thinking, only in our movements, or only in our emotional reactions. Don't let the analytical processing of law school allow other areas of awareness to drift away.

2. Don't stop at the case holding, learn to let the reasoning skills you develop as a lawyer take you to the mystery beyond words and be awed by that.

3. Get to know the really good teacher who is trying to teach you more than a method of legal analysis; who, by who he or she is, offers

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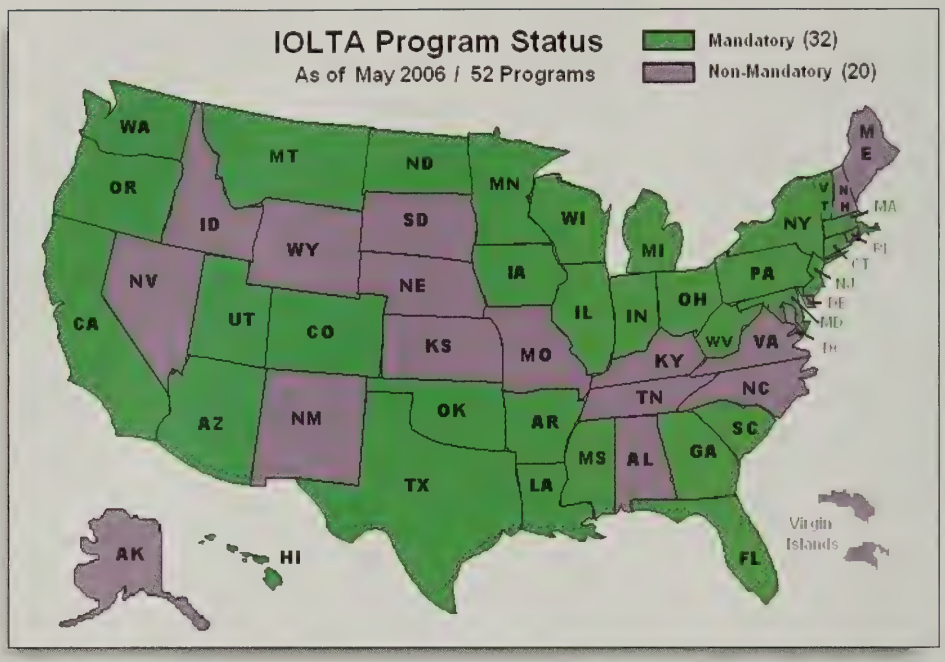
IOLTA Income Trends Upward

Financial

IOLTA income totals for 2006 continue to be strong. We recorded just over $1 million in each of the first two quarters and hope to improve on last year's income—the highest in NC IOLTA history at well over $3.9 million. To increase income, we continue to work to improve policies at participating banks and to increase IOLTA participation. Statewide, IOLTA participation is now just under 75%. Our color-coded map showing participation in North Carolina by judicial district was published in the summer 2006 edition of the NC State Bar *Journal*. We appreciate the assistance of a number of State Bar Councilors and other attorneys in improving participation in their districts.



Grants

Grant applications for 2007 were made available in July and due to the NC IOLTA office by Monday, October 2, 2006, to be reviewed in early December. We received 35 applications requesting a total of just over $4.3 million, compared to last year's 29 applications requesting over $3.6 million.

For 2006, NC IOLTA is administering $3.3 million in grants. Most grants to continuing grantees increased after several years of keeping grants flat due to concerns over declining income. The IOLTA trustees also used some of the 2005 income to replenish the reserve fund, which was established to stabilize grants when income is low, bringing that fund back to over $1.3 million.

State Funding for Legal Aid

The General Assembly approved an additional $1 million appropriation of recurring funds for legal aid work under the Civil Access to Justice Act, which NC IOLTA will be administering.

News from National Association of IOLTA Programs (NAIP)

The Mississippi Supreme Court has approved a rule change making IOLTA mandatory in that state. The change in the program's status will be effective January 1, 2007. There are now 32 states out of 52 (including DC and VI) where the IOLTA program is mandatory (see map above). Though North Carolina was at the vanguard in creating an IOLTA program—an important resource for the public good (as the 15th state to establish an IOLTA program)—we have not been as quick to make changes to program status, such as mandatory participation, that would enhance income totals.

The ABA Commission on IOLTA reports impressive revenue increases in the four states (Oklahoma, South Carolina, Utah, and Indiana) that converted to mandatory IOLTA between July 2004 and July 2005, when the average monthly IOLTA income generated during the six months before mandatory IOLTA conversion is compared to the most current monthly income figures available. Oklahoma, which converted from voluntary to mandatory, has seen a 417.9% increase. South Carolina, Utah, and Indiana, each of which converted from opt-out to mandatory IOLTA, have seen increases of 77.6%, 162.5%, and 267.4%, respectively.

New Participants

Your Interest Does Make A Difference!

Participation in IOLTA does not affect a lawyer's trust account practices and never affects the principal balance of the account. The participating bank calculates and remits all accumulated interest, less service charges, directly to IOLTA. Lawyers still retain complete discretion to determine whether a trust deposit is of sufficient size or duration to justify placement in a separate interest bearing account for a client.

To learn more about the IOLTA program or to become a participant, please call the IOLTA office at 919/828-0477.

Thank you to the following attorneys and firms who have joined the NC IOLTA Program since July 2006.

Akins Law Firm, Fuquay-Varina
Albright, S. Alan, Gastonia
Bell & Bell Law Firm, PC, Mooresville

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NC IOLTA PARTICIPATING BANKS

Banks denoted in green✶ have increased the value of their partnership with IOLTA by paying higher interest rates and reducing or waiving service charges resulting in additional funds available for grants.

Anson Bank✶
American Community Bank (New)
Asheville Savings Bank✶

Bank of America✶
Bank of Asheville
Bank of Granite
Bank of the Carolinas (New)
Bank of North Carolina
Bank of Stanly✶
Bank of Wilmington (New)
Branch Banking & Trust✶

Cabarrus Bank & Trust Co. ✶
Capital Bank✶
CapStone Bank (New)
Cardinal State Bank
Carolina Bank✶
Carolina Commerce Bank
Carolina First Bank✶
Carolina Trust Bank✶
Citizens South Bank✶
Coastal Federal Savings Bank✶
Cooperative Bank
Cornerstone Bank✶ (New)
Crescent State Bank

Farmers & Merchants Bank
Fidelity Bank
First Bank✶
First Capital Bank
First Charter Bank
First Citizens Bank✶
First Community Bank✶
First Federal Savings Bank of Lincolnton✶
First National Bank & Trust✶
First National Bank of Shelby✶
First South Bank
First Trust Bank
FNB Southeast
Four Oaks Bank✶

Gateway Bank (New)

Harrington Bank✶

Heritage Bank
High Point Bank✶
Home Trust Bank✶

KS Bank✶ (New)

Lexington State Bank
The Little Bank✶
Lumbee Guaranty Bank

Macon Bank
Mechanics & Farmers Bank
MidCarolina Bank
Mountain Community Bank
Mountain 1st Bank✶

New Century Bank
New Dominion Bank✶
North State Bank

Paragon Commercial Bank
Peoples Bank (New)
Port City Capital Bank✶
Premier Federal Credit Union✶

RBC Centura
Regions Bank✶
Roxboro Bank

Scottish Bank
Security Savings Bank
Select Bank & Trust (New)
SoundBank
SouthBank, Durham✶
Southern Bank & Trust
Southern Community Bank
SunTrust Bank

TriStone Bank (New)

United Community Bank

Waccamaw Bank✶
Wachovia Bank✶
Yadkin Valley Bank✶

If your bank is not listed and you wish to participate, please contact IOLTA at 919-828-0477; or via e-mail at IOLTA@ncbar.com; or by mail at PO Box 2687 Raleigh, NC 27602

A Brief History of the Surcharge

By L. Thomas Lunsford II

As the State Bar's Executive Director I do quite a few things that generally go unnoticed. Writing this column, for instance. Another, perhaps more poignant, example is my service as a whipping boy for those few who, having been disappointed by life, love, or the legislature, feel called upon to telephone a State Bar official from time to time to express their anger. Although I am always game for lively policy discussions, I am sometimes dispirited by the name calling and the disparaging historical references. This is particularly the case when the agency and I are not to blame for whatever has enraged the caller.

The General Assembly's recent imposition of a "surcharge" on active members of the State Bar to finance judicial elections seems to have brought out the worst in some people. Believing that the levy, which was plainly a well-intentioned attempt to solve a very pernicious problem, is defective as a matter of constitutional law, some of our members have irrationally questioned the Bar's involvement in its collection. One especially dyspeptic gentleman called me a couple of weeks ago and demanded to know why we were involved in the collection of what was obviously an unlawful tax. When I explained that we were directed to do so by statute, he denounced me as an "appeaser" of the legislature. Given that I have always thought of myself as more akin to Churchill than Chamberlain, I was unwilling to accept that characterization. I protested that we at the State Bar were without discretion in the matter—that we were, in effect, simply doing our duty. This plea was summarily rejected by the caller. He snorted dismissively and proceeded to wrap up the conversation, and the geopolitical metaphor, by informing me that under the circumstances the Nuremburg defense would not be available, so clear was our crime against humanity.

Because the surcharge has engendered such strong feelings, I thought it might be useful and therapeutic to review the events of the past year insofar as they relate to the State Bar's collection efforts. As we stroll down memory lane, it is important to realize that the last chapter in this saga is yet to be written. At the council's October meeting, the story did appear to be reaching its climax as several lawyers who had refused to pay the levy appeared before the Administrative Committee to show cause why they shouldn't be suspended for their civil disobedience. In very appropriate and lawyerlike fashion, they presented written and oral arguments challenging the legality of the charge and, most importantly for our purposes, the Bar's authority to penalize them for failing to pay. The committee was impressed with their presentation, troubled by perceived statutory ambiguity, and unwilling to give less than full consideration to the lengthy briefs that were filed on the eve of the meeting. It, therefore, decided to continue the matter until its next meeting in January. In the meantime, invoices for the annual membership fee (dues), the Client Security Fund assessment, and the surcharge for 2007 are being prepared for mailing in December. Payment of all charges is due on January 1 (and delinquent on July 1).

In considering this matter, it is important to realize that when the legislature amended the statute last year, its intent seemed clear to the State Bar's administrators. We assumed that the "surcharge" was essentially a species of "dues" that active members were liable to pay lest they be suspended. In other words, we understood that its payment was meant to be a condition of membership, an enforceable obligation. Operating on that assumption, we demanded payment, threatened suspension for nonpayment, issued show cause notices, and provided an opportunity to be heard. It was while providing that very opportunity that we for the first time heard it suggested that the surcharge was not "of a piece" with the annual membership fee but was, rather, something entirely different—a legal obligation that a lawyer might ignore with relative impunity since the legislature had failed expressly to provide an administrative penalty for nonpayment. It was this rather novel theory, along with the relative inscrutability of the term "surcharge," that seemed to compel the committee's decision to continue the case for further study.[1]

But let's not get too far ahead of ourselves. The "run up" to the Administrative Committee's meeting took quite a while and

is worth remembering. As I recall, the State Bar's leadership first became aware of the possibility that someone might sponsor a bill taxing lawyers to finance judicial campaigns in 2004. Although we instantly recognized that such an initiative would be terribly unpopular with many of our members, we also understood that the proposal was in essence a political question, and not a regulatory issue within the purview of the State Bar. It has long been our policy not to participate voluntarily in the legislative process in regard to nonregulatory matters, recognizing that political consensus among our dues paying members is a rare thing and trusting that the various voluntary bar associations can adequately represent all responsible points of view. For that reason, our officers decided that we would not take a position on any such bill.

Nothing much happened in 2004, but in the 2005 session of the General Assembly two bills were introduced that were intended to require lawyers exclusively to finance campaigns for appellate judicial office. One called for a surcharge on Bar dues, and the other called for an additional fee associated with the privilege tax. The bills never surfaced in committee and were never debated. In fact, the entire business seemed to have been forgotten until the provision imposing the surcharge turned up in the conference report on the budget in the waning moments of the session. It was then enacted, along with the rest of the budget, in very short order without ever having been discussed in public. We woke up one morning and it was law.

Although many in State Bar circles then supposed that the surcharge might not survive the inevitable constitutional challenge, we immediately began to plan for its collection. We considered including it on the invoice we regularly send to our members each December for the coming year's annual membership fee. But, because the surcharge was a relatively recent phenomenon that seemed likely to create consternation and confusion, we thought it might be more sensible and convenient to do the billing in the spring. Frankly, we also thought that there was a good chance that the surcharge might be a dead letter by April. A federal lawsuit challenging it on the basis of the First and Fourteenth Amendments had almost instantly materialized, and it was speculated that an injunction might soon issue or that the legislature might be persuaded quickly to revisit the matter. In any event, we decided to bill the surcharge separately from the dues.

The lawsuit, entitled *Jackson v. Leake*, was in fact already pending in the Middle District when the surcharge was enacted. The case had been initiated some months earlier to attack several unrelated provisions of the election laws. It was apparently easy for the plaintiffs' attorneys to find an aggrieved local lawyer to join the suit and the complaint was quickly amended. The only really remarkable thing about the case procedurally, at least from our standpoint, was the plaintiffs' decision to sue only the members of the State Bar Council's Administrative Committee, a body that has no real decision-making authority separate and apart from the council. Although it was tempting to abandon the committee members to their individual legal fates in order to save the cost of representation, we were spared a difficult choice when the attorney general graciously stepped forward and agreed to add our people to his client list. For many months thereafter the case languished in Greensboro. There was no injunction, there was really no significant activity of any sort. Recently, however, the matter was transferred to the Eastern District and assigned to Judge Britt. He rather quickly took control of the case and began hearing motions. In one ruling of particular significance to the State Bar, he granted our motion that the State Bar defendants be permitted to refrain from further participation in the case, presumably because the Bar takes no position on the substantive issues involved, has no discoverable information that is relevant to the proceedings, and is quite willing to abide by any final order of the court. In addition to sparing us the cost and inconvenience of being participating litigants, this wise decision should preclude our becoming liable for the plaintiffs' attorneys fees, if they prevail.

In April of this year, we sent out our invoices for the surcharge. During the six months preceding this provocative act, we had received relatively little comment from the membership regarding the impending levy. That the surcharge was coming due was no secret, but the lawyers did not seem to be greatly troubled or annoyed. This state of relative calm ended abruptly once our invoices were posted. While most of our members paid in fairly short order, large numbers paid "under protest" and raged against what they perceived as manifest injustice. Many had difficulty understanding how they could be lawfully compelled to subsidize the campaigns of candidates that they do not support. They also were unwilling to accept the legitimacy of a statute that requires lawyers to assume entirely a financial obligation that seems, if anything, to be a public responsibility. On those points I confess to having a fair measure of disbelief myself, but I am also aware that some authority exists in support of discriminatory taxes on lawyers. As I understand it, the special relationship that members of the Bar have to the courts and the system of justice is arguably a constitutionally sufficient predicate for assessments like the surcharge that are intended to insulate the courts from political pressures and potentially corrupting influences. If that is the case, critics of the legislation may ultimately have to seek a political solution.[2]

Although the collection of the surcharge has proceeded in fairly good order, I would be remiss if I failed to mention the cost of the exercise. The statute imposing the levy provides only that the State Bar shall collect the payments and remit them to the Board of Elections. It makes no provision for the State Bar's administrative costs. As a matter of fact, North Carolina's lawyers have had to bear not only the cost of the judicial campaigns, but also the expense of collecting the surcharge. Not counting overhead, we estimate that these costs have exceeded $35,000. This includes the cost of mailing invoices to approximately 20,650 active members, mailing second notices, hiring temporary employees to process the payments, programming the computer system to account for the money, processing credit card payments, and serving notices to show cause by certified mail. True enough, these costs have to some extent been offset by interest earned on bank deposits that have accumulated in the weeks leading up to our monthly transfers of funds to the Board of Elections, but the net expense has been substantial. Fortunately, some of these costs in the coming year will be eliminated by billing for the dues and the surcharge at the same time.

In movie parlance, this is about where we came in. In August we issued 342 notices to show cause to active members who had failed to pay only the surcharge. In September I was accused of being an appeaser and a war criminal. By the time the Administrative Committee convened the hearing referenced above in October, only about 58 lawyers were still delinquent, including the individuals who actually showed up and contended that the

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The Ethical Website

By Deanna S. Brocker and Douglas J. Brocker

Editor's Note: Deanna Brocker, assistant ethics counsel for over ten years, is leaving the State Bar to join her husband in the private practice of law. Deanna's calm, caring demeanor, insight, and intelligence made her a great asset to the ethics department and a beloved member of the staff. She will be missed. We wish her the very best.

In either establishing or redesigning a law firm website, the first step is deciding what its primary purpose will be. Some firms and lawyers use their websites primarily for informational purposes. Others, including many traditional North Carolina firms, use their websites to actively and sometimes aggressively market their practices and services. Either way, a law firm's website will be subject to the State Bar's general rules on advertising as well as the specific ethics opinions on websites discussed herein.

The next step is selecting a website domain name or Uniform Resource Locator (URL) designation. Even this basic decision implicates the ethics rules. First, if the website domain name "is more than a minor variation of the official name of the firm, it must be registered with the State Bar [as a trade name] in accordance with Rule 7.5(a) ...." 2005 FEO 8. Second, the URL or domain name cannot be false or misleading, as with any other firm trade name. The State Bar will permit the use of domain names, even when it is not apparent that the website is for a law firm. Examples of such approved domain names include "Druginjury.com" and "NCworkinjury.com." The website home page, however, must clearly and unambiguously identify the site as belonging to a law firm or lawyer. 2005 FEO 14.

A law firm also must decide whether to use metatags in its website to actively solicit potential clients. Metatags are hidden data in the HTML (hypertext mark-up language) for websites and are used to describe the contents of a website and to manipulate search engines. While there is no ethics opinion on point, Rule 7.1's prohibition against misleading communications about the lawyer's services is broad enough to cover metatags. They are a form of advertising, and as such, would probably be subject to the same restrictions as any other form of legal advertisement.

Website Content: What is Permitted and Prohibited

With regard to the content of a website, the general advertising rules apply. RPC 239. The North Carolina Rules of Professional Conduct now explicitly state that they apply to electronic communications, such as websites. Rule 7.2(a) and 7.3(b) & (c).

Websites are unlike other forms of advertising in a few key areas. Because websites are readily accessible to people all over the country and the world, North Carolina lawyers should identify the jurisdictions in which they are licensed to practice law to avoid any ambiguity or misrepresentation. RPC 239. This is particularly true if a law firm website promotes itself as a "national" firm or similar designation. A law firm having offices and clients only in North Carolina could not market itself as a "national practice" because it would be misleading under Rule 7.1. Failure to designate jurisdictional limitations in a website may also run afoul of other state's unauthorized practice laws.

Because websites are flexible and easy to change, lawyers and law firms have a *higher* obligation to maintain current and accurate information on their sites. For example, if a lawyer or practice section leaves a firm, the website should be updated as soon as possible.

Websites also are unique in that they permit inclusion of a volume of information that it would be impractical to include in more traditional advertising or marketing media. Information such as client lists, attorney resumes or bios, detailed descriptions of practice areas, and client testimonials may be posted on a website.

Not all client testimonials are acceptable forms of advertising, however. Some client endorsements or testimonials containing truthful information may be included in a website with the client's consent. For example, "soft endorsements," touting a lawyer's responsiveness, diligence, and efficiency, are permissible. However, the use of actors to pose as clients, the use of endorsements relating to a specific result or outcome in a case, or a comparison of the lawyer's services to others may violate the rules. A good rule of thumb: a client testimonial cannot say anything the lawyer could not say directly.

The State Bar has stated that lawyers may include verdict records on their website—at least theoretically. 2000 FEO 1. Generally, statements about the lawyer's record in obtaining favorable verdicts have been prohibited in other forms of advertising because such statements tend to create unjustified expectations in violation of Rule 7.1. Nonetheless, the State Bar acknowledges that it is possible to provide enough context in a website to avoid being misleading. This context would have to include information about the lawyer's unfavorable verdicts and settlements, success in collecting favorable verdicts, whether the cases were contested, and whether the opposing party was represented, among other items.

A Virtual Law Office to Deliver Unbundled Legal Services

A recent ethics opinion explores a cutting-edge use of the internet and websites to deliver legal services. 2005 FEO 10. This opinion deals with a law firm that is marketing and providing legal services exclusively over the internet as a "virtual

law firm." The virtual lawyer neither meets with clients nor maintains an office to do so. The State Bar outlined the following potential pitfalls with this type of arrangement: (1) engaging in the unauthorized practice of law in other jurisdictions; (2) violating advertising rules in other jurisdictions; (3) providing incompetent representation because of the limited client contact; (4) unintentionally creating a lawyer-client relationship; and (5) risking disclosure of client confidences. Assuming the law firm addresses and avoids these pitfalls, the State Bar ruled that a law firm ethically may maintain this type of virtual practice.

A second and equally important aspect of the opinion concerns providing "unbundled" legal services to *pro se* litigants and others through a website. "Unbundled" services are those offered on an á la carte basis to clients. Such limited services include document drafting assistance or review, legal advice, case evaluation, and litigation coaching. The lawyer may provide a limited menu of legal services pursuant to Rule 1.2, so long as the lawyer makes an independent legal judgment that such services can be provided ethically and effectively. 2005 FEO 10.

Conclusion

It is extremely likely that the use of websites and the internet to attract potential clients and deliver legal services will continue to increase dramatically in the years to come. Whether a lawyer is entering into e-marketing and e-services for the first time or expanding an existing website, it is important to keep abreast of both the ethical and technological developments in this area. Be careful, it's a "brave new world" out there. ■

Douglas J. Brocker and Deanna S. Brocker are the principals in The Brocker Law Firm, PA. They concentrate their practice in professional ethics, licensing, and disciplinary matters, including representing professionals in disciplinary matters before their respective licensing boards. They both speak and publish articles regularly on ethical and professionalism issues.

Doug formerly was trial and UPL counsel at the North Carolina State Bar, where he investigated and prosecuted disciplinary matters for approximately six years. Until recently, Deanna served as assistant ethics counsel to the North Carolina State Bar for more than ten years, where she answered ethics questions from attorneys all over the state.

IOLTA (cont.)

Bell Law Firm, Lillington
Best Law Firm, PLLC, Charlotte
Black, Wesley, Crouse
Bowie, Savanah R., Charlotte
Bowman, James L., Gastonia
Boyd, Babette J., Wilmington
Brocker Law Firm, PA, Raleigh
Carlson Law Firm, Charlotte
Carter, Robert C., Wilmington
Clayton Myrick McClanahan & Coulter, Durham
Coyne, Edward James, III, Raleigh
Dawson & Albritton, PA, Greenville
Dzani, NaaDei, Charlotte
Edsall, James T., Boone
Einstein Law Firm, PLLC, Morganton
Garrity & Gossage, LLP, Charlotte
Gore, Thomasina V., The Law Office of, Raleigh
Green, Jr., James P., PA, Henderson
Haddix, Elizabeth M., Pittsboro
Hartley, Tia G., Charlotte
Hemmings & Stevens, PLLC, Raleigh
Holley, David K., Graham
Jackson Lewis, LLP, Cary
Jones Jr., W. Bain, Raleigh
Kellam & Pettit, Charlotte
Kerner, T. W., Wilmington
Klauk, Jennifer M. J., Charlotte
Lapping & Lapping, Carthage
Metiko Law, PLLC, Durham
Morris, Bradley C., PLLC, Mooresville
Myers Bigel Sibley & Sajovec, PA, Raleigh
Nanney, Louis W., Spindale
Ortiz & Schick, PLLC, Raleigh
Perry, Randall L., The Law Offices of, Winston-Salem
Renfer, Rudolf E., Raleigh
Rivenbark, Christina & Associates, Wilmington
Sahl, Brad, Law Offices of, PC, Raleigh
Salines-Mondello, Lisa, Wilmington
Sandlin & Davidian, PA, Raleigh
Scales, Jr., Benjamin C., Asheville
Shapiro, Jesse S., Apex
Shelton-Yow, Kathleen, PLLC, Southern Pines
Sherrill, Hazel L., Statesville
Silver, David W., PA, Greenville
Spilman Thomas & Battle, PLLC, Winston-Salem
Stahl, Irving M., Tryon
Tatum Atkinson, Raleigh
Thompson, G. Kurt, Wilmington
Von Gnechten, J. Denice, Charlotte
Wamsley, Paul G., Charlotte
Wells, Sean N. R., Swansboro
Willett Law Firm, PA, Chapel Hill
Williams, Marcus W., Lumberton ■

Bank News

Capital Bank is now waiving service charges on all IOLTA accounts. This change should increase their average remittance to IOLTA by over 30%! Capital Bank also changed the timeline for their interest transactions, simplifying the monthly reconciliation process for their attorney customers.

New Banks We are pleased to report the following banks have started participating in the NC IOLTA program since the last publication of the *Journal*:

Gateway Bank & Trust Company
Peoples Bank
Bank of Wilmington

Adding new banks across the state offers more opportunities for attorneys and firms to participate in the IOLTA program.

A Profile in Specialization—Edward Boltz

An Interview with Denise Mullen, Assistant Director of Legal Specialization

Recently, I had an opportunity to talk with Edward C. Boltz, a member of the John T. Orcutt law firm and a certified specialist in consumer bankruptcy law. Ed graduated from Washington University in St. Louis and from George Washington University School of Law in Washington, DC, in 1996. He became a certified specialist in 2004, a year before the bankruptcy laws were substantially revised with the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. His comments on specializing in bankruptcy law follow.

Q: Why did you pursue certification?

I was interested in becoming a certified specialist mainly for personal satisfaction and pride. I had been in the practice area for a number of years and really wanted to test myself to see if I knew as much as I thought I did. It seemed like an objective measure of my knowledge base.

Q: How did you prepare for the examination?

I read and completed the online study guide. I talked to other attorneys who had taken the exam. They all suggested reading the Bankruptcy Code. I read the entire code 4-5 times, and then re-read sections about things I didn't see in my daily practice. I read with the idea of connecting the code with the law as I knew it and saw it in my practice.

Q: Was the certification process (exam, references, application) valuable to you in any way?

I found preparing for the exam to be very valuable. I found many nuggets of information that I was able to use in new ways for quite a few of my cases. Overall, it was a great opportunity to refresh my memory.

Q: Has certification been helpful to your practice?

Certification has probably been the most helpful in my relationship with other lawyers. In a consumer practice with internet savvy clients, it is helpful. But some of my clients are poor and just want to see someone right away who can help save their house. They're not looking for a specialist, per se.

Q: What do your clients say about your certification?

Many are very glad to see the credential. In difficult cases, they seem especially glad. I had one client greet me by saying she knew I was the "man for the job" because she had found my certification online. Many of my cases are relatively simple, and I have found to be true the old adage about spending 95% of my time on 5% of my cases. Some clients are willing to trust, but some come in so worn down and burdened that it's hard to establish a trust. In those cases, the clients do seem to appreciate the certification and feel that at least I know how to handle things.

Q: Are there any hot topics in your specialty area right now?

Our ongoing hot topic is the new bankruptcy code. With everything being new, we have to litigate issue after issue in order to establish case law. At this point, there are more decisions coming out of North Carolina courts than nearly any other state. The laws will have been in effect for a year in October and there are parts that are just not easily understood, including hanging paragraphs, triple negatives, terms of art… I just completed an hour and half hearing on the meaning of the words "such" and "and." We have become experts at interpreting semantics!

Q: How do you stay current in your field?

The bankruptcy judges, particularly in the Middle District, do a good job of getting current opinions into the hands of lawyers. I regularly check the court website at www.ncmb.uscourts.gov for important opinions. In 2005, I took 84 credit hours of continuing legal education courses to really learn the new laws. As a board certified specialist, I am invited to speak at seminars fairly often. In order to do that, I have to do a lot of research and really dig into the information to prepare. I particularly enjoy the opportunity to speak when the judges are in attendance, as that gives me the chance to frame some of the questions I have for them.

Q: Is certification important in your practice area?

It is important; it does set us apart a bit. Since our fees are generally regulated flat fees, it is in the best interest of the consumer to select the best lawyer he or she can find. The consumer won't pay more for a more experienced lawyer. Becoming board certified

CONTINUED ON PAGE 71

Richard Garrison

After hanging paintings by Richard Garrison (featured on this page) in the storefront windows of the State Bar building several weeks ago, more than the usual number of State Bar employees and visitors to the building remarked on the installation. The art work in our windows, which changes every quarter, generally elicits comment (favorable and unfavorable—usually depending upon how abstract the work is) from employees and guests, but never before to the extent and with such consistent approval as Garrison's work. This apparently universal appeal of Garrison's paintings validates the success of the artist's attempt in recent works to reflect the universal in the particular. He describes his vision in the following artist's statement:

> In my representations of the human figure I am interested in capturing something of the underlying spiritual nature that permeates all things, and connects us to the rest of the universe. I try to render these figures as anonymous and therefore universal symbols for humankind. The presence of light, for me symbolic of physical and spiritual nature, is always important to my work, and helps, along with a saturation of color, to connect the figure with its surrounding environment. Specificity of place is not important so the locations of the figures are similarly anonymous and universal in their abstraction. I wish for the viewer of my work to pause and to feel the presence of that connecting spiritual nature.

Garrison, a native of Raleigh, trained first at the School of Design at North Carolina State University and then in the art department of the University of North Carolina at Chapel Hill where he earned a BFA in 1985. After college, he became an art instructor and taught in the Wake County Public Schools for 13 years. His work has earned a number of awards and has been exhibited consistently and extensively for the past 15 years. Recent exhibitions include "About Humanity," a group show at City Art Gallery in Greenville, North Carolina; "Observations: Line, Color, Form," a solo exhibit at New Elements Gallery in Wilmington; and "Expressions: A Survey of Spiritual Art in the Triangle," at Longview Gallery in Raleigh. Garrison's work is included in private collections as well as corporate collections including the collections of Bank of America, SAS Institute, and Duke University. ■

Figure Seated on Sunny Lawn

Each quarter, the works of a different contemporary North Carolina artist are displayed in the storefront windows of State Bar building. The artworks enhance the exterior of our building and provide visual interest to pedestrians passing by on Fayetteville Street. The State Bar is grateful to The Collectors Gallery (successor to the Raleigh Contemporary Gallery), the artists' representative, for arranging this loan program. The Collectors Gallery is a full service gallery that represents national, regional, and North Carolina artists, and provides residential and commercial consulting. Readers who want to know more about an artist may contact Rory Parnell or Megg Rader at TCG, 323 Blake Street, Raleigh, NC 27601 (919.828.6500).

Attorneys Receive Professional Discipline

Disbarments

James T. Conrad of Charlotte surrendered his law license and was disbarred by the council. Conrad admitted that he misappropriated at least $314,000 from a family trust of which he was trustee and of which he and his siblings were the intended beneficiaries.

Samuel T. Currin of Raleigh surrendered his law license to the council and was disbarred. Currin pled guilty in federal court to conspiracy to commit money laundering, obstructing the due administration of the Internal Revenue Code, and obstructing the grand jury process.

James B. Ethridge of Dunn was disbarred by the DHC. Before he became a Harnett County District Court Judge, Ethridge misappropriated client funds by depositing the funds of an elderly woman into an account in his own name and used the funds for other than the client's benefit. Ethridge also recorded a deed conveying the client's real property to himself and made a false representation on the public record by purchasing revenue stamps for the conveyance when he had paid no consideration.

Katherine McDiarmid of Greensboro surrendered her law license and was disbarred by the council. McDiarmid admitted that she misappropriated approximately $10,000 from her former law firm's trust account.

Paul R. Schell of Charlotte was disbarred for embezzling client funds, neglecting and failing to communicate with multiple clients, collecting excessive fees, failing to return unearned fees, failing to participate in the State Bar's fee dispute program, failing to respond to inquiries of the State Bar, and several technical trust account violations.

Brent Wood of Raleigh was disbarred by the DHC. Wood was convicted in federal court of wire fraud and other felonies.

Suspensions & Stayed Suspensions

Richard Broadnax, formerly of Reidsville, was suspended for five years with the possibility that the final two years might be stayed upon compliance with enumerated conditions. Broadnax was already serving a three-year suspension imposed in a prior DHC case. The five-year suspension will take effect immediately upon the completion of the three-year suspension or upon the entry of any stay of any portion of the three-year suspension. Broadnax failed to file and pay state and federal income taxes for six years, had technical trust account violations, and failed to respond to the State Bar.

Robert C. Howes of Statesville was suspended from the practice of law for two years for lack of diligence, failing to communicate with clients, failing properly to supervise nonlawyer assistants, failing promptly to disburse entrusted funds, damaging clients during the professional relationship, failing properly to maintain entrusted funds, failing to account properly for entrusted funds, and using entrusted funds for the benefit of third parties. The misconduct occurred in several real estate transactions. The two-year suspension was stayed for five years on numerous conditions.

Thomas F. Loflin III and **Ann F. Loflin** of Durham, husband and wife, were disciplined for failure to file state income tax returns and failure to pay state tax obligations for the years 1998 through 2003. The Loflins were each convicted in state court of six counts of misdemeanor failure to file and pay. By consent order, the DHC imposed a three-year suspension of Thomas Loflin's license, with all but 30 days of the suspension stayed for three years on enumerated conditions, and imposed a two-year suspension of Ann Loflin's license, stayed for two years upon enumerated conditions.

Frank G. Pinkston of Winston-Salem was suspended for two years for failing to refund an unearned fee, practicing law during an administrative suspension, failing to communicate with a client, failing to participate in the State Bar's mandatory fee dispute program, and failing to respond to the State Bar. All but six months of the suspension were stayed upon Pinkston's compliance with enumerated conditions.

Mark F. Reynolds of High Point was suspended for five years for failing to participate in the State Bar's mandatory fee dispute program and failing to the respond to the State Bar. The five-year suspension will begin at the completion of a five-year suspension imposed in a prior DHC case.

Jacob E. Setzer of Charlotte entered into a consent order of discipline after he pled guilty to and was convicted of misdemeanor larceny in Mecklenburg County. The court had suspended Setzer's law license for six months. The DHC order suspends Setzer's license for two years, but permits the final 18 months to be stayed after service of the court's suspension and upon enumerated conditions.

Alan T. Smith of Fayetteville was disciplined for client neglect, unauthorized practice of law, and failure to respond to inquiries of the State Bar. The DHC entered a consent order suspending Smith's license to practice law for five years. Smith can apply for a stay of the final two years upon compliance with enumerated conditions.

In 2004, **Rodney S. Toth**, previously of Charlotte, consented to an order of discipline imposing a 90-day suspension which was stayed for three years. Toth was disciplined for client neglect, failing promptly to disburse entrusted funds, and failing to maintain necessary trust account records. The DHC activated the 90-day suspension because of Toth's failure to comply with the conditions of the stay.

Terry T. Zick of Wilmington was disciplined for neglecting a client and charging a clearly excessive fee. Zick was already serving a five-year suspension from a prior DHC case. The final two years of the existing suspension could be stayed upon Zick's compliance with enumerated conditions. In the more recent case, the DHC entered a consent order adding as further conditions of any stay that Zick must pay restitution and reimburse the Client Security Fund.

Censures

Richard G. Badgett of Winston-Salem was censured by the DHC for making loans

and facilitating other financial transactions between an estate he represented and corporations in which he had a personal monetary interest.

Carey L. Ewing of Durham was censured by the Grievance Committee for executing a false jurat and misrepresenting the circumstances under which a notarization had occurred, for representing both the buyers and the seller corporation in conveyances of real property when she was a part owner of the seller corporation, and preparing HUD-1 Settlement Statements that did not accurately reflect all aspects of the transactions. The Grievance Committee found several factors in mitigation.

Travis Simpson of Winston-Salem was censured by the Grievance Committee for failing to file personal injury actions before statutes of limitation expired, concealing those failures from his clients, failing to communicate with clients, and failing to respond to the local district grievance committee and the State Bar.

Reprimands

Richard C. Boyd of Durham was reprimanded for failing to respond to a Letter of Notice from the State Bar.

Joseph L. Carlton of Raleigh was reprimanded by the Grievance Committee for sending a non-lawyer to preside in his stead at a real estate closing, for failing adequately to supervise non-lawyer assistants, and for listing fees to non-lawyer assistants as legal fees on a HUD-1 Settlement Statement.

Ronald E. Cooley of Hillsborough was reprimanded by consent order of the DHC. Cooley was disciplined for client neglect, failing to participate in good faith in the mandatory fee dispute program, attempting to charge an illegal and clearly excessive fee, representing that his fee was "nonrefundable," and failing to respond to and misleading the Grievance Committee.

Zabrina Dempson of Durham was reprimanded by the Grievance Committee for preparing a false opinion of title and failing to disclose material facts about a real estate transaction. The Grievance Committee found in mitigation that Dempson did not realize her services were being used to perpetrate a fraudulent transaction and did not knowingly facilitate fraud.

George T. Hagood of Charlotte was reprimanded by the Grievance Committee for facilitating the unauthorized practice of law by a corporation. The Grievance Committee found in mitigation that Hagood attempted unsuccessfully to comply with the requirements of the State Bar's ethics opinions.

Keith R. Henry of Asheville was reprimanded by the Grievance Committee for signing his clients' names to a deed and notarizing the deed, falsely certifying that the clients had appeared before him to sign the deed. The evidence was in conflict as to whether both clients authorized Henry to sign their names. Henry's conduct was mitigated by his lack of a dishonest or selfish motive and by his lack of prior discipline.

Cindy Huntsberry of Smithfield was reprimanded by the Grievance Committee for telling a client she would perfect an appeal, failing to do so, and failing to communicate with the client.

Reginald Kelly of Lillington was reprimanded by the Grievance Committee for placing an advertisement containing a comparison of his law firm's services with other lawyers' services which could not be factually substantiated and containing other misleading representations.

Lawrence J. Kissling III of Raleigh was reprimanded by the Grievance Committee for sending a postcard soliciting professional employment which purported to be a "change of address" notification but which was sent to a person with whom Kissling had not previously had any communication. The solicitation did not contain the required language "This is an advertisement for legal services" on the outside.

Stafford R. Peebles of Winston-Salem was reprimanded by the Grievance Committee for engaging in a conflict of interest in representing the wife in a domestic matter against the husband while representing both the husband and wife in a joint bankruptcy filing.

Transfers to Disability Inactive Status

The Gaston County Superior Court entered an interim order transferring the law license of **James T. Stroud** of Gastonia to disability inactive status. ■

LAP (cont.)

a way to participate in the greater meaning of being a lawyer.

4. Our culture is very intellectual and we're all trained to verbalize. Don't let this training become a way to avoid experience and emotions. We all had an inner capacity to experience and know, prior to words.

5. Do activities that strengthen your physical body, and through that your body knowing. And do activities that strengthen you emotionally and your emotional knowing. Do activities that strengthen you spiritually—your connection to nature, to that which is greater than you.

6. Last, but not least, keep your wonderful sense of humor and have fun. There is a link between humor's humility that is not just etymological to get to minds.

I applaud the strong values you hold and the keen, innate sense of emotional intelligence you have. My plea (without knowing how best for you to do this) is don't let law school diminish these assets. Rather, find opportunities while in law school to strengthen them. Wisdom is inextricably linked with the experience of values. Move toward those experiences where you must hold your values fiercely and at the same time be open to letting them be transformed into a deeper wisdom.

I look forward to seeing you at the break. ■

The North Carolina Lawyer Assistance Program is a confidential program of assistance for all North Carolina lawyers. The Lawyer Assistance Program addresses alcoholism, other addictions, depression, and other mental health problems. The LAP has two committees of lawyer volunteers who assist other lawyers: the PALS Committee and FRIENDS Committee. If you are a North Carolina lawyer, judge, or law student and would like more information go to www.nclap.org or call toll free: Don Carroll (for Charlotte and areas West) at 1-800-720-7257, Towanda Garner (in the Piedmont area) at 1-877-570-0991, or Ed Ward (for Raleigh and down East) at 1-877-627-3743. Don is the author of "A Lawyer's Guide to Healing" published by Hazelden.

Endnotes

1. Holy Bible, King James Version, Matthew 6:27
2. Lao Tsu, Tao Te Ching, translated by Gia-Fu-Feng and Jane English (New York: Vintage Books, Random House, 1997), number one.

Third Quarter Blues

By Bruno DeMolli

**Each quarter, Staff Auditor Bruno DeMolli reports to the Ethics Committee on his findings while auditing lawyers' trust accounts during the preceding quarter. The purpose of this column is to share Bruno's observations with the general membership of the bar. If there is a question about trust accounting that you would like answered, please direct your inquiry to "Bruno's Tips" c/o Alice Mine at the State Bar mailing address or amine@ncbar.com.*

During the third quarter of 2006, I spent my time performing procedural audits on the trust account records of the lawyers in the 24th Judicial District (Avery, Madison, Mitchell, Watauga, and Yancey Counties) and the 27B Judicial District (Cleveland and Lincoln Counties). In the 24th, 33 lawyers were randomly selected from the 124 lawyers on record with the State Bar as active members of the 24th. In 27B, there are 104 lawyers on the State Bar roll. Of these, 27 lawyers were randomly selected for review.

I am sure that the lawyers in both districts think that their counties or districts are being picked on: since the random audit program started in April 1985, I have visited with lawyers in each district on four separate occasions. The 24th district was previously audited in 1990, 1993, 1996, and 2001. The 27B district was previously audited in 1988, 1989, 1995, and 2002. These audit records, however, are pretty standard for most of the judicial districts.

Each quarter, I audit the trust accounts of 60 lawyers from two judicial district bars. The week before the quarterly meeting of the State Bar Council, a computer software program randomly selects six judicial districts from the 39 judicial districts in the state. Although only two judicial districts participate each quarter, the field of six names is necessary to avoid redundancy. A truly random software program that picks only two judicial districts each quarter has the disadvantage of potentially selecting the same judicial districts quarter after quarter. Several years ago, when the computer program was set to select the names of only two districts, one particular judicial district was picked three times in five years. (Needless to say, the lawyers in that district were a little more paranoid than usual about activities of their State Bar.) Under the current procedure, six districts are initially selected by computer to generate the field from which the final selections are made. I review the list of six to determine how many times and the dates on which each district was selected since the inception of the random audit program. I then identify the two judicial district bars that will be audited during the quarter by eliminating from the list the four judicial districts that have been audited most recently and frequently.

What I Found in the 24th and 27B

As usual, the lawyers in the 24th and 27B judicial districts received me cordially and fully cooperated with the procedural audit process. If this article was about the hospitality of the local bar, there would be no third quarter blues to report. I am singing the blues because the list of common violations by the lawyers in the two districts and the frequency of the violations, being fairly representative of what I find when I visit other district bars, reinforces the woeful observation that lawyers violate the same provisions of the trust accounting rules, Rule 1.15-1 to 1.15-3 of the Rules of Professional Conduct, year after year. Here is the list of the ten most common violations I found in the 24th and 27B and the percentage of audited lawyers in the two districts who were out of compliance:

- The date of deposit appearing on client's ledger did not reconcile with bank record. (67%)
- Written accountings were not provided to clients at the end of representation or at least annually. (60%)
- The trust account was not reconciled quarterly. (57%)
- Deposit slips did not identify client or source of funds if the source was other than personal. (42%)
- Check images did not include copies of the backs of checks. (38%)
- Clients had negative balances. (38%)
- Checks did not indicate from which client balance the funds were drawn. (27%)
- The directive instructing the lawyer's depository bank to notify the State Bar if a check is presented against insufficient funds was not on file with the bank. (25%)
- A ledger for deposit of lawyer's funds to service the account was not maintained. (15%)
- A ledger was not maintained for each person or entity from whom trust funds were received. (13%)

Who's Next?

Judicial districts selected for audit during the fourth quarter of 2006 are Judicial District 6A (Halifax County) and Judicial District 19A (Cabarrus County). Perhaps the lawyers in Halifax and Cabarrus, having read this article, will chase away my blues with perfect compliance with the trust accounting rules—just in time for the holidays! ■

ATTENTION! NEW ADDRESS FOR DUES PAYMENTS

Due to a change in banking, the NC State Bar will no longer accept membership dues payments at the Charlotte lockbox address listed on last year's dues statement. All payments of 2007 membership dues must be mailed to the address below. (This new mailing address will be provided on your 2007 dues statement.)

The NC State Bar
Attention: Membership Dept.
PO Box 26088
Raleigh, NC 27611

Amendments Pending Approval of the Supreme Court

At meetings on April 21, 2006, July 21, 2006, and October 20, 2006, the council of the North Carolina State Bar voted to adopt the following amendments for transmission to the North Carolina Supreme Court for approval.

Amendments to the Rule on Standing Committees of the Council

27 N.C.A.C. 1A, Section .0700, Standing Committees of the Council

The amendment creates a new standing committee, known as the Finance and Audit Committee, to be appointed by the president and report to the Executive Committee on a quarterly basis.

Amendments to the Discipline and Disability Rules

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

Amendments to the rule governing the issuance of a subpoena for cause audit identify certain circumstances that are believed to constitute reasonable cause to support the issuance of such subpoenas.

Amendments to the Rules Governing the Lawyer Assistance Program

27 N.C.A.C. 1D, Section .0600, Rules Governing the Lawyer Assistance Program

The amendments provide for the appointment of the dean of a North Carolina law school as an *ex officio* member of the LAP Board and delete Rule .0614 which authorized the board to file a grievance under certain circumstances.

Amendments to the Rules Governing the Client Assistance Program and the Fee Dispute Resolution Program

27 N.C.A.C. 1A, Section .0700, Standing Committees of the Council

27 N.C.A.C. 1D, Section .0700, Procedures for Fee Dispute Resolution Rules

The amendment to the rule on standing committees of the State Bar Council changes the name of the Client Assistance Committee to the "Attorney/Client Assistance Committee." Amendments to the standing committees rule and to the rules on the procedures for fee dispute resolution also change the name of the program administered by the committee to the "Attorney/Client Assistance Program." Amendments to the rules governing the fee dispute resolution program reflect more accurately the purpose of the program and the role of the fee dispute coordinator.

Amendments to Procedures for the Administrative Committee

27 N.C.A.C. 1D, Section .0900 Procedures for Administrative Committee

To preserve the 30-day grace period within which a member may pay dues without detrimental effect after being served with a suspension order for failure to pay, the amendments make a suspension order effective 30 days after proof of service on the member.

Amendments to Rules Governing the Administration of the CLE Program

27 N.C.A.C. 1D, Section .1600, Regulations Governing the Administration of the Continuing Legal Education Program

Amendments to Rule .1605 of the rules governing the CLE Program grant CLE credit for teaching the following: continuing paralegal education courses; law courses at new North Carolina law schools that are seeking ABA accreditation; and courses at an ABA approved paralegal school or program. The amendments also increase the number of CLE credits awarded for teaching at an ABA accredited law school, and use the same formula to calculate the CLE credit awarded for teaching at a new law school or at a paralegal school.

Amendments to The Plan of Legal Specialization

27 N.C.A.C. 1D, Section .1700, The Plan of Legal Specialization,

Section .1800, Hearing and Appeal Rules of the Board of Legal Specialization

Section .2200, Certification Standards for the Bankruptcy Law Specialty

The amendments allow the Board of Legal Specialization to enter into confederations with ABA-accredited national certifying organizations in regard to the administration of written examinations in specialty practice areas controlled by federal law.

Amendments to the Plan for Certification of Paralegals

27 N.C.A.C. 1G, Section .0100, Certification of Paralegals

Amendments to the Plan for Certification of Paralegals address three oversights in the original plan. Amendments to Rule .0105 create a nominating process to focus the voting of certified paralegals on the nominees whose names are sent to the council for appointment to a paralegal vacancy on the board. Amendments to Rule .0119 provide that the 18 credit hours required in the educational standard for certification must be obtained in a structured certificate program at a school that has been designated by the board as a qualified paralegal studies program. Amendments to Rule .0122 create procedures for an applicant to request reconsideration of an unfavorable decision of the board.

Amendments to The Rules of Professional Conduct

27 N.C.A.C. 2, Rules of Professional Conduct

Rule 0.1, Preamble: A Lawyer's Professional Responsibilities

Rule 1.17, Sale of a Law Practice

Rule 3.4, Fairness to Opposing Party and Counsel

Rule 3.8, Special Responsibilities of a Prosecutor

Rule 5.5, Unauthorized Practice of Law

Rule 7.3, Direct Contact with Potential Clients

The amendments are various and are briefly described in the following paragraph:

A new paragraph in the preamble elaborates upon a lawyer's professional responsibilities toward other lawyers. The amendments to Rule 1.17 permit a sole practitioner to sell his or her practice and open a new practice provided the new law office is at least 100 miles away from the purchased practice. The amendments also allow the seller to work for the purchaser or provide *pro bono* representation to indigents and family members. The amendments to Rule 3.4 prohibit a lawyer from failing to disclose evidence or information that the lawyer knew, or should have known, was subject to disclosure. The amendments to Rule 3.8 require a prosecutor to make "reasonably diligent inquiry" prior to making timely disclosure of all evidence or information that must be disclosed pursuant to law. Amendments to Rule 5.5 permit an applicant for admission to the North Carolina State Bar by comity to engage in practice under certain conditions. The amendments to Rule 7.3 clarify how the advertising disclosure must appear on targeted direct mail letters.

Proposed Amendments

At its meeting on October 20, 2006, the council voted to publish the following proposed rule amendments for comment from the members of the bar.

Proposed amendments to the Rules Governing the Administration of the CLE Program

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Legal Education Program

27 N.C.A.C. 1D, Section .1600, Regulations Governing the Administration of the Continuing Legal Education Program

The Board of Continuing Legal Education recommends amendments to the rules governing the CLE program to provide clear accreditation standards for programs relating to law practice management, skills training, and technology training. The proposed rule amendments also eliminate references to the board's administration of a "law practice assistance program" which is no longer in existence.

.1501 Scope, Purpose, and Definitions

(a) Scope

....

(b) Purpose

The purpose of these continuing legal education rules is to assist lawyers licensed to practice and practicing law in North Carolina in achieving and maintaining professional competence for the benefit of the public whom they serve....

It has also become clear that in order to render legal services in a professionally responsible manner, a lawyer must be able to manage his or her law practice competently. Sound management practices enable lawyers to concentrate on their clients' affairs while avoiding the ethical problems which can be caused by disorganization. ~~These rules therefore provide for the administration of a law practice assistance program which is expected to emphasize training in law office management.~~

It is in response to such considerations that the North Carolina State Bar has adopted these minimum continuing legal education requirements. The purpose of these minimum continuing legal education requirements is the same as the purpose of the Revised Rules of Professional Conduct themselves—to ensure that the public at large is served by lawyers who are competent and maintain high ethical standards.

(c) Definitions

(1) "Accredited sponsor" ....

~~(11) "Law practice assistance program" shall mean a program administered by the board to provide training in the area of law office management.~~

~~(12)~~ (11) A "newly admitted active member" ....

[Renumbering remaining paragraphs.]

.1602 Course Content Requirements

(a) Professional Responsibility Courses on Substance Abuse, Chemical Dependency, and Debilitating Mental Conditions - ....

(b) Law School Courses. ....

(c) Law Practice Management Courses – A CLE accredited course on law practice management must satisfy the accreditation standards set forth in Rule .1519 of this subchapter with the primary objective of increasing the participant's professional competence and proficiency as a lawyer. The subject matter presented in an accredited course on law practice management shall bear a direct relationship to either substantive legal issues in managing a law practice or a lawyer's professional responsibilities, including avoidance of conflicts of interest, protecting confidential client information, supervising subordinate lawyers and nonlawyers, fee arrangements, managing a trust account, ethical legal advertising, and malpractice avoidance. The following are illustrative, non-exclusive examples of subject matter that may earn CLE credit: employment law relating to lawyers and law practice, business law relating to the formation and operation of a law firm, calendars, dockets and tickler systems, conflict screening and avoidance systems, law office disaster planning, handling of client files, communicating with clients, and trust accounting. If appropriate, a law practice management course may qualify for professional responsibility (ethics) CLE credit. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: marketing, networking/rainmaking, client cultivation, increasing productivity, developing a business plan, improving the profitability of a law practice, selling a law practice, and purchasing office equipment (including computer and accounting systems).

(d) Skills and Training Courses – A course that teaches a skill specific to the practice of law may be accredited for CLE if it satisfies the accreditation standards set forth in Rule .1519 of this subchapter with the primary objective of increasing the participant's professional competence and proficiency as a lawyer. The following are illustrative, non-exclusive examples of subject matter that may earn CLE credit: legal writing, oral argument, courtroom presentation, and legal research. A course that provides general

instruction in non-legal skills shall NOT be accredited. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: learning to use computer hardware, non-legal software, or office equipment; public speaking; speed reading; efficiency training; personal money management or investing; career building; marketing; and general office management techniques.

(e) Activities That Shall Not Be Accredited ~~Nonlegal Educational Activities - A course or segment of a course presented by a bar organization may be granted up to three hours of credit if the bar organization's course trains volunteer attorneys in service to the profession, and if such course or course segment meets the requirements of Rule .1519(2)-(7) and Rule .1601(b), (c), and (g) of this subchapter; if appropriate, up to three hours of professional responsibility credit may be granted for such course or course segment. Except as noted in the preceding sentence or in extraordinary circumstances, -approval~~ CLE credit will not be given for general and personal educational activities. ~~For example, the following types of courses will not receive approval:~~ The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit:

(1) courses within the normal college curriculum such as English, history, social studies, and psychology;

(2) courses ~~which~~ that deal with the individual lawyer's human development, such as stress reduction, quality of life, or substance abuse unless a course on substance abuse or mental health satisfies the requirements of Rule .1602(c);

(3) ~~courses which deal with the development of personal skills generally, such as public speaking (other than oral argument and courtroom presentation), nonlegal writing, and financial management~~;

~~(4)~~ courses designed primarily to sell services or products or to generate greater revenue, such as marketing or advertising (as distinguished from courses dealing with development of law office procedures and management designed to raise the level of service provided to clients).

(f) Service to the Profession Training ~~Nonlegal Educational Activities~~ - A course or segment of a course presented by a bar organization may be granted up to three hours of credit if the bar organization's course trains volunteer attorneys in service to the profession, and if such course or course segment meets the requirements of Rule .1519(2)-(7) and Rule .1601(b), (c), and (g) of this subchapter; if appropriate, up to three hours of professional responsibility credit may be granted for such course or course segment.

~~(d)~~(g) In-House CLE and Self-Study. No approval will be provided for in-house CLE or self-study by attorneys, except those programs exempted by the board under Rule .1501(c)(10) of this subchapter or as provided in Rule .1604(e) of this subchapter.

~~(e)~~(h) Bar Review/Refresher Course. Courses designed to review or refresh recent law school graduates or attorneys in preparation for any bar exam shall not be approved for CLE credit.

Proposed Amendments to the Rules Governing the Administration of IOLTA

27 N.C.A.C. 1D, Section .1300, Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts

27 N.C.A.C. 2, Rules of Professional Conduct

Rule 1.15-4, Interest on Lawyers' Trust Accounts

In October 2004, the State Bar Council asked the IOLTA Board of Trustees to administer the state funding for legal aid programs which passes through the North Carolina State Bar. To clarify that the Board of Trustees has the authority to administer these funds, the board recommends amendments to the rules that address the authority of the board and the source of funds for the IOLTA program.

The IOLTA Board also recommends that the rule of professional conduct concerning the administration of its program be amended to provide that most of the information in the program's possession relating to the bank accounts of participating lawyers be regarded as "confidential information" not generally available to persons or entities outside of the program. The proposed amendments will safeguard the privacy of lawyers who participate in IOLTA by reducing the likelihood that information regarding bank accounts can be obtained by unauthorized persons or entities. The proposed amendments further provide that such information may be made available to agents of the State Bar's disciplinary program upon written request and to other persons pursuant to court order or other legal process.

27 N.C.A.C. 1D, Section .1300, Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts

.1302 Jurisdiction: Authority

The Board of Trustees of the North Carolina State Bar Plan for Interest on Lawyers' Trust Accounts (IOLTA) is created as a standing committee by the North Carolina State Bar Council pursuant to Chapter 84 of the North Carolina General Statutes for the disposition of funds received by the North Carolina State Bar from interest on trust accounts or from other sources intended for the provision of legal services to the indigent and the improvement of the administration of justice.

...

.1312 Source of Funds

Funding for the program carried out by the board shall come from funds remitted

CONTINUED ON PAGE 65

The Process

Proposed amendments to the Rules of the North Carolina State Bar are published for comment in the *Journal*. They are considered for adoption by the council at the succeeding quarterly meeting. If adopted, they are submitted to the North Carolina Supreme Court for approval. Amendments become effective upon approval by the court. **Unless otherwise noted, proposed additions to rules are printed in bold and underlined, deletions are interlined.**

Comments

The State Bar welcomes your comments regarding proposed amendments to the rules. Please send a written response to L. Thomas Lunsford II, The North Carolina State Bar, PO Box 25908, Raleigh, NC 27611.

Committee Clarifies When Funds May Be Transferred from Trust Account Following Fee Dispute

Council Actions

At a meeting on October 20, 2006, the State Bar Council adopted the opinion summarized below upon the recommendation of the Authorized Practice Committee:

Authorized Practice Advisory Opinion 2006-1

Appearances at Quasi-Judicial Hearings on Zoning and Land Use

Opinion rules that a person who is not a lawyer may not appear in a representative capacity for another in a quasi-judicial hearing before a planning board, board of adjustment, or other governmental body.

At the meeting on October 20, 2006, the State Bar Council also adopted the opinions summarized below upon the recommendation of the Ethics Committee:

2006 Formal Ethics Opinion 7 (Revised)

Participation in a For-Profit Networking Organization

Opinion rules that a lawyer may be a member of a for-profit networking organization provided the lawyer does not distribute business cards and is not required to make referrals to other members.

2006 Formal Ethics Opinion 12

Obtaining a Loan to Fund Litigation Costs

Opinion explores the circumstances under which a lawyer may obtain litigation funding from a financing company.

2006 Formal Ethics Opinion 13

Nonlawyer Signing a Lawyer's Name to a Pleading

Opinion rules that if warranted by exigent circumstances, a lawyer may allow a paralegal to sign his name to court documents so long as it does not violate any law and the lawyer provides the appropriate level of supervision.

Ethics Committee Actions

At its meeting on July 20, 2006, the Ethics Committee agreed that Proposed 2006 FEO 14, *Payment of Fee for Consultation,* should be published for comment. Unfortunately, the proposed opinion was inadvertently omitted from the Proposed Opinions article in the last edition of the *Journal.* That oversight is rectified below. At its meeting on October 19, 2006, the committee agreed that Proposed 2006 FEO 3, *Representation in Purchase of Foreclosed Property,* should continue to be studied by a subcommittee and that six proposed opinions should be published for comment. The proposed opinions appear below. The comments of readers are welcomed.

Proposed 2006 Formal Ethics Opinion 14
Payment of Fee for Consultation
July 20, 2006

Proposed opinion rules that when a lawyer charges a fee for a consultation, and the lawyer accepts payment, there is a client-lawyer relationship for the purposes of the Rules of Professional Conduct.

Inquiry:

John Doe consulted Attorney A about a property line dispute with Mr. Doe's neighbor. At the request of Attorney A, Mr. Doe paid Attorney A a consultation fee of $100, which was accepted by Attorney A. Thereafter, Mr. Doe hired another lawyer to represent him in the property dispute.

Was John Doe a former client or merely a prospective client?

Opinion:

When a lawyer agrees to meet with someone concerning a legal matter and charges that person a consultation fee for the service, which is paid, a client-lawyer relationship is established for purposes of the Rules of Professional Conduct. The duties of loyalty and confidentiality exist with respect to the matter discussed. Rule 1.7. If the client does not retain the lawyer for further assistance, the client becomes a former client.

Ordinarily, a person who discusses the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client. A prospective client receives some, but not all, of the protections afforded clients and former clients. Rule 1.18. However, when a lawyer charges a fee that the heretofore prospective client pays, in exchange for the lawyer's time and/or advice, a client-lawyer relationship exists with respect to the provision of that service. If the representation proceeds no further—for example, the client does not retain the lawyer for additional assistance—the client becomes a former client. Rule 1.9.

Proposed 2006 Formal Ethics Opinion 15
Dormancy Fee on Unclaimed Funds
October 19, 2006

Proposed opinion rules that a lawyer may charge a reasonable dormancy fee against unclaimed funds if the client agrees in advance and the fee meets other statutory requirements.

Inquiry:

Rule 1.15-2(q) requires a lawyer to make due inquiry into the identity and location of the owner of unclaimed funds in his trust account. If this effort is unsuccessful and the provisions of G.S. 116B-53 are satisfied, the property shall be deemed abandoned. The lawyer must then follow the provisions of G.S. 116B for the escheat of abandoned property. Pursuant to G.S. 116B-57(a), the holder of abandoned or unclaimed funds may charge a reasonable "dormancy" fee, thereby reducing the amount of funds transferred to the State Treasurer's Office, so long as the holder has made a good faith effort to locate the owners of the funds, there is a valid and enforceable written contract which imposes the charge, and the charge is applied on a regular basis.

Attorney A would like to start charging a dormancy fee for abandoned funds to cover some of the costs and time associated with reasonable efforts to locate the client. Attorney A proposes including the following language in all his fee contracts:

> A reasonable dormancy fee shall be charged against any remaining funds in the client's trust account which are not claimed after notice to the client and/or

issuance of a refund check six months from the date of the finalization of client's case. The charge shall be based on time and effort spent making reasonable efforts to contact client and return funds. Said charges shall not exceed $200.00 per year.

May Attorney A charge a dormancy fee as set forth in his fee contract?

Opinion:

Attorney A may charge a dormancy fee against unclaimed funds so long as (1) the client receives prior notice of and gives written consent to the dormancy fee, (2) the amount of the fee is appropriate under Rule 1.5(a) of the Rules of Professional Conduct, and (3) the fee complies with the statutory requirements of G.S. 116B-57(a) and any other restrictions imposed by the Unclaimed Property Program of the State Treasurer's Office.

Proposed 2006 Formal Ethics Opinion 16 Distribution of Disputed Legal Fees October 19, 2006

Proposed opinion rules that under certain circumstances a lawyer may consider a dispute with a client over legal fees resolved and transfer funds from the trust account to his operating account to pay those fees.

Inquiry #1:

Attorney represents Client in a personal injury matter. Client signs a written fee agreement and agrees to pay Attorney 30% of any recovery made in his case. After negotiations with the insurance carrier, Attorney settles Client's case. Attorney receives the settlement check and release and places the funds in his trust account. Client signs the release but disputes the 30% contingent fee. Pursuant to Rule 1.15-2(g), Attorney holds the disputed fees in his trust account and disburses the remainder appropriately. Attorney then gives Client notice of the State Bar's Fee Dispute Resolution Program as required under Rule 1.5(f). Client elects to participate in the process by filing a petition. After Attorney provides a response to the petition and the State Bar staff reviews the file, it is determined that Client's dispute is not meritorious and the staff issues a dismissal letter.

Notwithstanding the dismissal, Client continues to object to the payment of the fee. Because fee dispute resolution is nonbinding, Attorney continues to hold the funds in his trust account. Attorney would like to transfer the funds from the trust account to his operating account.

When may Attorney consider the dispute resolved and transfer the funds without Client's consent?

Opinion #1:

A lawyer is required to hold disputed legal fees in his trust account until the dispute is resolved. Rule 1.15-2(g) and Rule 1.15, comment [13]. Therefore, a client who continues to dispute a legal fee but takes no action to recover the funds, in effect, forces the lawyer to hold the disputed funds in trust indefinitely. To avoid this anomalous result, the lawyer may transfer the funds from the trust account to his operating account after the dismissal of a petition by the State Bar's Fee Dispute Resolution Program, but only if he has given the client reasonable notice that the funds will be transferred to the operating account if no legal action is taken by a certain date. Providing 30 days notice for the client to take legal action to recover the funds should be a reasonable amount of time. If, within that time frame, the client files a lawsuit to recover the funds, the lawyer must continue to hold them in trust.

Inquiry #2:

Assume the same facts as in Inquiry #1, except that Attorney indicates, in his response to the fee petition, a willingness to reduce his fee to try to resolve the controversy. Attorney and Client agree to have their dispute mediated by the State Bar's Fee Dispute Resolution Program, but they reach an impasse during the mediation process. The State Bar staff sends a letter to Client and Attorney notifying them that the file has been closed due to an impasse.

If Client continues to dispute the fee but takes no legal action, may Attorney transfer the disputed funds from the trust account to his operating account?

Opinion #2:

Yes, so long as Attorney has given adequate notice to Client of his intent to transfer the funds as set forth in Opinion #1, and Client does not file a lawsuit to recover the funds within the notice period.

Inquiry #3:

Assume Client notifies Attorney that he disputes his 30% contingent fee, but fails to file a fee dispute petition or to initiate legal action to recover the disputed funds.

When may Attorney consider the dispute resolved and transfer trust funds to the operating account to pay his fee?

Opinion #3:

In the absence of oversight from the Fee Dispute Resolution program, a lawyer may transfer disputed funds in his trust account only if (1) he has given the client 30-days written notice of the fee dispute program required under Rule 1.5(f); (2) the client fails to elect fee dispute resolution; (3) the funds held in the trust account are for services rendered and are not clearly excessive; and (4) after the 30 days has expired with no fee petition filed by the client, the lawyer gives the client a second written notice, as required in Opinion #1, that the funds will be transferred to the operating account unless the client initiates legal action within 30 days. If, at any point during the 30 days, the client elects to participate in the fee dispute program or initiates legal action to recover the funds, the lawyer must hold the funds in trust pending resolution of the dispute.

Proposed 2006 Formal Ethics Opinion 17 Autodialed Recorded Message to Potential Clients October 19, 2006

Proposed opinion rules that a lawyer may advertise by autodialing potential clients and playing a recorded telephone message with information about a legal issue or the lawyer's legal services provided the message does not include a mechanism to connect the recipient directly to the lawyer or an agent of the lawyer.

Inquiry:

Attorney would like to solicit professional employment by use of a recorded telephone message. He intends to obtain telephone numbers from the census bureau's database of persons who are not on the "do not call" list for commercial solicitations by telephone. Attorney's law firm (or a service hired by the firm) will autodial the people on the list. When a person answers the phone, he will hear the following recorded message:

> This is an announcement of the Tax, Estate & Elder Planning Center, a North Carolina law firm. Have you or your loved ones experienced the overwhelming cost of nursing home, assisted living, or in home care? The Tax, Estate & Elder Planning

Center would like for you to know more about government programs that may help cover these costs while protecting your savings. If you would like to know more about these programs press one now.

If the recipient presses the number one on the key pad of his phone, he will hear a short pre-recorded informational message on programs such as Medicaid, Special Assistance, and veterans' benefits. Whether the recipient opts to listen to the message or not, he will hear the following recorded message at the end of the phone call:

If you are interested in knowing more about how to qualify for these programs, then press two to be connected with a representative of the Tax, Estate & Elder Planning Center Law Firm. Thank you for taking time to listen to this announcement.

If the recipient of the phone call follows the prompts, he will be connected with a person at Attorney's law firm.

Does this comply with the Rules of Professional Conduct?

Opinion:

Rule 7.2(a) permits a lawyer to advertise services through "written, recorded, or electronic communications" subject to the requirements of Rule 7.1 and Rule 7.3. Rule 7.1 requires all communications about a lawyer and the lawyer's services to be truthful and not misleading. Rule 7.3 limits direct contact with potential clients for the purpose of soliciting business. Rule 7.3(a) provides that "A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a potential client when a significant motive of the lawyer's doing so is the lawyer's pecuniary gain...." The comment explains the prohibition as follows:

[1] There is a potential for abuse inherent in direct in-person, live telephone, or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[2] This potential for abuse inherent in direct in-person, live telephone, or real-time electronic solicitation of potential clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a potential client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the potential client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

The rule and the comment distinguish a prohibited live telephone call from a lawyer in which "the layperson [is subject] to the private importuning of the trained advocate in a direct interpersonal encounter" from "recorded communications which may be...autodialed...without subjecting the potential client to direct in-person, telephone, or real-time electronic persuasion that may overwhelm the client's judgment."

Although it appears that recorded telephone advertising messages are permitted by the Rules of Professional Conduct, Rule 7.3(a) and the comment to the rule do not contemplate that a recorded message will lead to an interpersonal encounter with a lawyer (or the lawyer's agent) at the push of a button on the telephone key pad. To avoid the risks of undue influence, intimidation and, overreaching, a potential client must be given an opportunity to contemplate the information about legal services received in a recorded telephone solicitation. This cannot occur if a brief, unexpected, and unsolicited telephone call leads to an in-person encounter with a lawyer, even if the recipient of the phone call must choose to push a number to be connected with the lawyer.

Therefore, Attorney may autodial potential clients and play a recorded message provided the message is truthful and not misleading. He may not, however, include a means for the recipient of the call to be immediately connected with a lawyer (or an agent of the lawyer). Instead, the message may provide a telephone number or other contact information for the lawyer or the lawyer's firm so that the potential client may subsequently call the lawyer or law firm after contemplating the information received from the recorded message. Comment [3] to Rule 7.3 supports this "clean" and "free" flow of information to potential clients:

The use of general advertising and written, recorded, or electronic communications to transmit information from lawyer to potential client, rather than direct in-person, live telephone, or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communi-

Rules, Procedure, Comments

All opinions of the Ethics Committee are predicated upon the Rules of Professional Conduct as revised effective March 1, 2003, and thereafter amended, and referred to herein as the Rules of Professional Conduct (2003). The proposed opinions are issued pursuant to the "Procedures for Ruling on Questions of Legal Ethics." 27 N.C.A.C. ID, Sect .0100. Any interested person or group may submit a written comment or request to be heard concerning a proposed opinion. Any such request should be directed to the Ethics Committee at PO Box 25908, Raleigh, NC 27611, prior to the next meeting of the committee in January 2007.

Captions and Headnotes

A caption and a short description of each of the proposed opinions precedes the statement of the inquiry. The captions and descriptions are provided as research aids and are not official statements of the Ethics Committee or the council.

Public Information

The Ethics Committee's meetings are public, and materials submitted for consideration are generally NOT held in confidence. Persons submitting requests for advice are cautioned that inquiries should not disclose client confidences or sensitive information that is not necessary to the resolution of the ethical questions presented.

cations permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone, or real-time electronic conversations between a lawyer and a potential client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

Proposed 2006 Formal Ethics Opinion 18
Surrender of Deposition Transcript
October 19, 2006

Proposed opinion rules that, when representation is terminated by a client, a lawyer who advances the cost of a deposition and transcript may not condition release of the transcript to the client upon reimbursement of the cost.

Inquiry #1:

Attorney A represented Client in an action alleging that Client was beaten by guards at the county jail. Attorney A advanced over $2,000 for the cost of a deposition and the deposition transcript. Client discharged Attorney A and hired Attorney B to prosecute his claim. Attorney B requested the file, including the deposition transcript, from Attorney A. Attorney A refused to release the transcript unless he was paid for the cost of the deposition and the transcript.

May Attorney A condition release of the deposition transcript on reimbursement for the amount advanced for the deposition and the transcript?

Opinion #1:

No. Rule 1.16(d) requires a lawyer "[u]pon termination of representation...[to] take steps to the extent reasonably practicable to protect a client's interests, such as...surrendering papers and property to which the client is entitled..." RPC 79 is also on point. The opinion provides that a lawyer who advanced the cost of obtaining medical records to decide whether to take a case may not condition the release of the records to the client upon reimbursement for the cost. The following excerpt includes the operative provisions of the opinion:

> Law Firm X must turn over unconditionally to its client any material such as copies of medical reports or statements of expert opinion which were obtained on the client's behalf and account if such would be useful to the client in further prosecution of her claim. Rule 2.8(a)(2) of the Rules of Professional Conduct [now Rule 1.16[1]] requires that a lawyer who withdraws from employment take reasonable steps to avoid foreseeable prejudice to rights of the client. One means of avoiding such prejudice is, in the language of the rule, "delivering to the client all papers and property to which the client is entitled." Although the rule itself does not define the extent of the client's entitlement, the comment to the rule does indicate that, "anything in the file which would be helpful to successor counsel should be turned over."... If material obtained during the evaluation process on the client's account would be of some value to the client in pursuing her claim, it must, under the terms of the rule, be surrendered unconditionally without regard to whether the cost of its acquisition was advanced by the law firm or the client.

Rule 1.16(d) does permit a lawyer to retain papers relating to the client "to the extent permitted by other law." However, the Ethics Committee is aware of no North Carolina statutory or case law that entitles a discharged lawyer to a general or retaining lien on the papers or other property received by the lawyer during the client's representation. Even in jurisdictions where retaining liens are permitted by law, the regulatory bars "generally have held that a lawyer's legal right to execute a lien granted by law to secure a fee or expense is subordinate to ethical obligations owed to the client." *Annotated Model Rules of Professional Conduct*, Fifth Ed., p. 275 (2003); *see also, Restatement of the Law Governing Lawyers*, §43 Comment b. ("A lawyer ordinarily may not retain a client's property or documents against the client's wishes."); Rule 1.16, cmt. [10]("The lawyer may never retain papers to secure a fee.").

Inquiry #2:

Attorney A would like to include the following provision in his legal services agreement:

> Except in the case of misconduct, client agrees not to settle, compromise, or litigate said claim, or to retain any other attorney to handle said claim, without first paying attorney the costs and expenses and fees above specified.

May Attorney A include this provision in his legal services agreement?

Opinion #2:

No, this provision is contrary to two key precepts of the Rules of Professional Conduct: the client's right to legal counsel of choice and the client's right to decide the objectives of his representation. A client has a right to discharge a lawyer at any time, with or without cause. Rule 1.16, cmt. [4]. Similarly, a client has an absolute right, at any time, to decide whether to settle, compromise, or litigate his claim. Rule 1.2(a). This provision is a violation of the Rules on its face and may not be included in a legal services agreement.

Endnote

1. Rule 1.16 replaced Rule 2.8 when the Rules of Professional Conduct were revised in 1997. Rule 1.16(d) is essentially identical to the paragraph in Rule 2.8 that it replaced.

Proposed 2006 Formal Ethics Opinion 19
Communication by Guardian ad Litem with Represented Person
October 19, 2006

Proposed opinion rules that the prohibition against communications with represented persons does not apply to a lawyer acting solely as a guardian ad litem.

Inquiry #1:

G.S. Section 7B-601 of the Juvenile Code provides for the appointment of a

guardian ad litem (GAL) for every child alleged to be abused or neglected. The section states that a GAL who is not an attorney shall be appointed an attorney to assure the protection of the child's legal rights through the dispositional phase of the proceedings and after disposition when necessary to further the best interests of the child. The section also provides that the GAL and the attorney advocate have standing to represent the juvenile in all actions under the subject chapter.

Some of the duties of the GAL, as defined in G.S. 7B-601, include: investigating the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; facilitating, when appropriate, the settlement of disputed issues; exploring options with the judge at the dispositional hearing; and protecting and promoting the best interests of the juvenile.

It is alleged that Child A was sexually abused by her father. Attorney X and Guardian Ad Litem Y were appointed to represent Child A in the juvenile petition. Guardian Ad Litem Y is not an attorney. She is interested in interviewing the mother of Child A. The mother is represented in this matter by another attorney. Must Guardian Ad Litem Y obtain the approval of the mother's attorney before communicating with the mother?

Opinion #1:

No. Rule 4.2 only prohibits communications with a represented person "[d]uring [the lawyer's] representation of a client." This prohibition does not apply to Guardian Ad Litem Y because it does not apply to nonlawyers.

Inquiry #2:

Would Opinion #1 be different if Guardian Ad Litem Y is an attorney but is performing the role of guardian ad litem solely and is not performing the role of the attorney advocate?

Opinion #2:

No. Guardian Ad Litem Y may communicate with the mother without obtaining the consent of the mother's attorney. If Guardian Ad Litem Y is not acting as the attorney advocate but is only serving as the appointed special guardian "at law" of the child, she is not subject to the prohibition in Rule 4.2 because she is not acting in the course of her representation of a client. *See* Opinion #1.

Inquiry #3:

Would Opinion #1 change if the person with whom Guardian Ad Litem Y wanted to speak also had an appointed GAL?

Opinion #3:

No.

Proposed 2006 Formal Ethics Opinion 20
Use of Departed Lawyer's Surname in Firm Name
October 19, 2006

Proposed opinion rules that a law firm may not continue to use a former member's surname in the law firm name if the member continues the practice of law with another firm.

Inquiry #1:

Attorney John Doe is the sole shareholder of a professional corporation (PC) engaged in the practice of law. The PC goes by the name of The John Doe Law Firm. Attorney Doe has invested millions of dollars in the PC's marketing materials that contain his surname and likeness. He also uses trademarked slogans that incorporate his first name and/or his surname. Attorney Doe believes that, through his marketing efforts, his name and face have become synonymous with the "face" or "brand" of the PC.

Attorney Doe would like to have other lawyers join the PC as shareholders. Attorney Doe, however, wants to maximize the investment he has already made in the PC. Attorney Doe would like to grant to the PC the right to use his name and likeness under the following terms:

> The PC will purchase from Attorney Doe the right to use his name as a trade name of the PC, and to use his name and likeness in advertising and marketing materials for the private practice of law. The PC may not sell the name or likeness or use the name or likeness in the marketing or advertising of any other service or product. The PC may use the name during Attorney Doe's life and following his death.

May Attorney Doe grant to the PC the right to use Attorney Doe's name under these terms?

Opinion #1:

Yes, so long as the agreement complies with Rule 7.5. While the Rules of Professional Conduct do not specifically limit the use of the lawyer's name by a firm in which he is a member, Rule 7.5 does restrict the circumstances under which a surname can continue to be used when the lawyer ceases to practice with the firm. "A firm may be designated by the names of all or some of its members, by the names of deceased or retired members where there has been a continuing succession in the firm's identity, or by a trade name...." Rule 7.5, cmt. [1]. [1]

Rule 7.5 permits a law firm to continue to use a lawyer's surname if he retires from the practice of law or after his death, so long as the lawyer was a member of the firm immediately preceding his retirement or death. Subsequent communications listing the former member's name on law firm letterhead, however, should clarify that the former member is deceased or retired so as not to mislead the public. If Attorney Doe leaves the PC and begins engaging in the private practice of law, the PC could not continue to use Attorney Doe's surname because it would be misleading pursuant to Rule 7.1. See Rule 7.5(a), cmt. [1]. Any agreement between Attorney Doe and the PC must reflect this restriction.[2]

Inquiry #2:

May Attorney Doe grant to the PC the right to use Attorney Doe's likeness under these terms?

Opinion #2:

No. Including a deceased or retired member's likeness or image in advertisements conveys active participation in the law firm and therefore would be misleading under Rule 7.1. Furthermore, the inclusion of disclaimer language in the advertisement would not overcome the misleading nature of the communication.

Inquiry #3:

Assume that the agreement between the PC and Attorney Doe further contemplates that Attorney Doe is free to leave the firm at any time and practice elsewhere in the state, but restricts his ability to use his own name or likeness in any advertising materials promoting the new venture. The agreement states that once Attorney Doe leaves the PC, he is

CONTINUED ON PAGE 60

State Bar Swears in New Officers


Michael


Hankins


McMillan

Michael Elected President

Kitty Hawk attorney Steven D. Michael was elected as president of the North Carolina State Bar. He was sworn in by Chief Justice Sarah Parker at the State Bar's Annual Meeting on Thursday, October 19, 2006, and officially took office at the conclusion of the council meeting on October 20, 2006.

After graduating from East Carolina University, Michael attended law school at the University of North Carolina. He earned his degree in 1975 and was admitted to the practice of law that same year.

Michael worked with the Raleigh firm of Ransdell & Ransdell from 1975-1977. From 1977-1980, Michael worked in the Wake County District Attorney's office, and then practiced in Manteo with Kellogg, White, Evans, Sharp & Michael from 1980-1985. In 1991-1992, Michael served as a Resident Superior Court Judge in the First District. He is currently a partner with the firm of Sharp, Michael, Outten & Graham.

Michael has been a State Bar Councilor representing the First Judicial District since 1996. In addition to chairing the council's Issues Committee, he has served on the Grievance Committee, the Authorized Practice Committee, and the Special Committee on Real Property Closings.

In addition to serving on the State Bar Council, Michael is active with the First District Bar Association and the American Bar Association.

Hankins Elected President-Elect

Charlotte attorney Irvin W. Hankins III was elected as president-elect of the North Carolina State Bar. He was sworn in by Chief Justice Sarah Parker at the State Bar's Annual Meeting on Thursday, October 19, 2006, and officially took office at the conclusion of the council meeting on October 20, 2006.

Hankins earned both his undergraduate and law degrees (with honors) from the University of North Carolina at Chapel Hill. From 1968 to 1972 he served in the US Navy. Hankins was admitted to the practice of law in 1975. That year he joined the firm now known as Parker, Poe, Adams & Bernstein, LLP. Hankins is general counsel to the firm and served as its managing partner from 1987-2002. He is admitted to practice before the federal district courts in North Carolina, the Fourth Circuit Court of Appeals, and the United State Supreme Court.

Hankins has been a State Bar Councilor representing Judicial District 26 since 1997. He has served on numerous committee and has chaired the Ethics Committee, Issues Committee, and the Authorized Practice Committee.

In addition to serving on the State Bar Council, Hankins has served as general counsel to the Charlotte Chamber of Commerce, is past-president of the UNC Law Alumni, is a member of the Queens University of Charlotte Board of Trustees, and is a member of the NC Association of Defense Attorneys. He is also a member of the Selwyn Avenue Presbyterian Church where he has served as a deacon and an elder. He and his wife, Bobbie, have two daughters and two grandchildren

McMillan Elected Vice-President

Raleigh attorney John B. McMillan was elected as vice-president of the North Carolina State Bar. He was sworn in by Chief Justice Sarah Parker at the State Bar's Annual Meeting on Thursday, October 19, 2006, and officially took office at the conclusion of the council meeting on October 20, 2006.

McMillan earned both his BA and JD degrees from the University of North Carolina at Chapel Hill. He was admitted to the practice of law in 1967. That same year he joined the firm at which he still practices—Manning, Fulton & Skinner, PA—where he concentrates on legislative advocacy, administrative law, and general litigation.

McMillan became a State Bar Councilor in 1997 and currently serves on the Executive, Emerging Issues, Ethics, and Legislative Committees.

In addition to serving on the State Bar Council, McMillan is a member of the North Carolina Bar Association, Wake County Bar Association, American Bar Association, and the North Carolina Academy of Trial Lawyers. This year he is president of the Law Alumni Association of UNC.

McMillan has received several awards including the Wake County Bar Association's Joseph Branch Professionalism Award and its President's Award. He has also been recognized by Legal Services of North Carolina. He is listed in the 2007 edition of The Best Lawyers in America for Government Relations Law and Eminent Domain and Condemnation Law. He has been named to Business North Carolina's Legal Elite List and has been recognized as a General Litigation and Political Law "Super Lawyer" in the *North Carolina Super Lawyer Magazine.*

McMillan's civic responsibilities include work with the North Carolina Clean Water Management Trust Fund Board of Trustees, the Friends of the North Carolina Museum of Natural Sciences Board of Directors, and the Law Alumni Association of UNC, Inc., Board of Directors. ■

Fifty-Year Lawyers Honored

As is traditional, members of the North Carolina State Bar who are celebrating the 50th anniversary of their admission to practice were honored during the State Bar's Annual Meeting at the 50-Year Lawyers Luncheon. One of the honorees, Judge William L. Osteen, addressed the gathering and each honoree was presented a certificate by the president of the State Bar, Calvin Murphy, in recognition of his or her service. After the ceremonies were concluded the honorees in attendance sat for the photograph below. ■

First Row (Left to Right): Charles Thomas Johnson Jr., Russell M. Robinson II, Nick Galifianakis, Frances M. Fletcher Jr., Julius A. Rousseau Jr., Lawrence Egerton, Paul Bennett Guthery Jr., Sydnor Thompson Jr., Billy Brown Olive, Donald B. Strickland *Second Row* (Left to Right): Joseph Felton Turner Jr., Alexander H. Barnes Sr., Walter Lee Horton Jr., Richard Tillman Fountain Jr., Roy A. Cooper Jr., Hugh M. Wilson, Solomon G. Cherry, John C. W. Gardner, John Cornelius Riggs, William Blakeley Mills, Myron C. Banks *Third Row* (Left to Right): Harley Black Gaston Jr., George W. Ferguson Jr., William C. Brewer Jr., Horace E. Stacy Jr., Richard E. Thigpen Jr., Frederick Taylor Mattox, Richard Lamar Kennedy, William L. Osteen, Romallus O. Murphy, William E. Rouse Jr., William Pailin Skinner Jr.

Ethics Opinions (cont.)

free to practice elsewhere using any proper firm name (not including his own surname) or State Bar approved trade name for advertising purposes. He may only use his surname, however, in listings on firm letterhead, telephone directories, and business cards.

Under this proposed agreement, can the PC continue to use Attorney Doe's surname as the name of the PC after Attorney Doe leaves the PC to engage in the private practice of law?

Opinion #3:

No. See opinion #1 above. ■

Endnote

1. As a point of clarification, Attorney Doe's surname is not a trade name, and the licensing of the name to a PC in which Attorney Doe is a member does not change the surname's classification. The terms "Law Firm" or "Law Office" are technically trade names, but because these are useful means of identifying law firms, lawyers may use either designation without registering the trade name.
2. In addition, the agreement must not violate Rule 5.6(a) which prohibits a lawyer from participating in a partnership, shareholder, employment, or other similar agreement that restricts the right of a lawyer to practice after termination of the relationship.

Chambers Receives Professionalism Award

Julius L. Chambers has been selected as the 2006 recipient of the Chief Justice's Professionalism Award. This award is presented annually by the chief justice of the North Carolina Supreme Court at the Annual Meeting of the North Carolina State Bar.

Born in 1936 and reared in a small, rural community east of Charlotte, Julius L. Chambers learned about racial discrimination growing up in North Carolina. He graduated from high school in May 1954, the very month of the United States Supreme Court's landmark ruling in *Brown v. Board of Education*, and entered North Carolina Central University (then North Carolina College) in the fall of that year.

In his senior year, Mr. Chambers served as president of the student body, graduating *summa cum laude* with a degree in history. He then earned a masters degree in history at the University of Michigan. In 1959, he was admitted to law school at the University of North Carolina at Chapel Hill, which had just begun to admit African Americans under pressure of litigation. Mr. Chambers was chosen editor in chief of the Law Review, thus becoming the first African American to hold this title at any historically white law school in the South. Ranking first in his class of 100 at graduation in 1962, he entered Columbia University Law School and taught while earning a masters of law degree.

In 1963, Mr. Chambers was the first legal intern in an exciting new program of the NAACP Legal Defense and Educational Fund, Inc. (LDF). This program provided promising African American law graduates with 12 months of training in civil rights litigation and then sent them home where they would commence law practice specializing in civil rights law as "LDF cooperating attorneys." The LDF provided some initial capital and a small monthly stipend to keep these fledgling law practices afloat in their infancy.

In June 1964, Mr. Chambers opened his law practice in a cold water walkup on East Trade Street in Charlotte. This one person law practice eventually became the first integrated law firm in North Carolina history. In its first decade, this law firm did more to influence evolving federal civil rights law than any other private law practice in the United States. Mr. Chambers and his founding partners, James E. Ferguson II and Adam Stein, working with lawyers of the LDF, successfully litigated civil rights cases and helped shape the contours of civil rights law by winning landmark United States Supreme Court rulings in such cases as *Swann v. Charlotte Mecklenburg Board of Education* (1971) (the famous school busing decision); and *Griggs v. Duke Power Co.* (1971) and *Albemarle Paper Co. v. Moody* (1974) (two of the Supreme Court's most significant Title VII employment discrimination decisions).

Photo courtesy of Charlotte Observer

Considering the South's racial attitude at the time, *Swann* was not a popular case: Mr. Chambers saw his life threatened, his office torched, and his car firebombed. Yet, he fought the case all the way to the Supreme Court and convinced the Court that busing was an acceptable tool for desegregating schools.

In 1984, Mr. Chambers left the law firm to become director-counsel of the NAACP Legal Defense and Educational Fund in New York City. He was the third director-counsel of the LDF, following Thurgood Marshall and Jack Greenberg. At the LDF, he was the field marshall for 24 staff attorneys and approximately 400 cooperating attorneys around the nation. LDF has offices in New York City, Washington, DC, and Los Angeles, and maintains an active caseload of more than 1,000 cases, covering such areas as education, voting rights, capital punishment, employment, housing, and prisons. Under Mr. Chambers' leadership, the LDF became the first line of defense against the political assault on civil rights legislation and affirmative action programs that began in the 1970s and 1980s. He returned to North Carolina in 1993 to become chancellor of North Carolina Central University, his alma mater. Under his leadership, the university launched a $50 million capital fundraising campaign, and established its first ten endowed chairs, including the one million dollar Charles Hamilton Houston Chair at the school of law.

In 1995, Mr. Chambers was one of three lawyers who argued *Shaw v. Hunt* (argued December 5, 1995), the landmark legislative redistricting case, before the Supreme Court. This case forced the Court to decide the constitutionality of two North Carolina congressional districts that were redrawn after the 1990 census according to provisions in the 1965 Voting Rights Act to ensure equitable minority representation. In the most recent ruling in this case (*Hunt v. Cromartie*), the Supreme Court sustained two congressional districts which enabled North Carolina to elect its first black congressional representatives since reconstruction.

Mr. Chambers retired from his position as chancellor of North Carolina Central University on June 30, 2001, and reentered private law practice with the firm he started in 1967 (now Ferguson, Stein, Chambers, Gresham & Sumter, PA). He is married to Vivian Giles Chambers, has two adult children, Derrick and Judy, and three grandchildren. ■

Bar Presents Awards to Students for Pro Bono Service

Each year the State Bar honors a student from each of the state's law schools for distinguished pro bono service. The honorees are selected by the schools themselves.

The nominee from the Norman Adrian Wiggins School of Law at Campbell University is **Nardene Mary (Nan) Guirguis**. Nan received her law degree in May of this year and recently passed the bar examination and was admitted to the North Carolina State Bar. She is being recognized for her volunteer work on behalf of a battered women's shelter known as Safe Haven, an organization which she also served as a member of its board of directors and as its secretary-treasurer. In addition, she is to be commended for her work with the guardian ad litem program and her work with an organization known as POPS, an acronym that stands for Project for Older Prisoners.

This year the law school at the University of North Carolina has nominated **Leann Quattrucci**. Leann also graduated last May. During her career as a law student, she was heavily engaged in volunteer service on behalf of the poor and disadvantaged. She was actively involved with the school's guardian ad litem program, the Center for Civil Rights, the Center for Child and Family Health, "Just Democracy," the Domestic Violence Advocacy Project, and the Pro Bono Board. Not only did she perform pro bono services herself, but she was also involved in many of these organizations in a leadership capacity.

The recipient of this year's pro bono award from North Carolina Central University's School of Law is **Alesia M. Vick**. Like the other award winners, Alesia graduated last spring. Throughout her law school career, she volunteered considerable amounts of her time in the cause of pro bono service. She contributed her services to the North Carolina Department of Labor and the North Carolina Department of Justice, to the Just Democracy Election Protection Project, to the North Carolina office of the American Civil Liberties Union, and to the National Health Law Program. Additionally, she helped organize and lead the law school's "Road Trip for Relief" under the auspices of which she and other NCCU law students traveled to New Orleans and volunteered with a legal clinic to assist residents facing eviction from temporary FEMA housing.

Zia Cromer is Duke Law School's nominee for the pro bono award. Zia was president of the Duke Law Volunteer Income Tax Assistance program which prepared income tax returns for hundreds of low-income people, thereby saving them fees, protecting them from scams, and collecting thousands in Earned Income Tax Credits. In spring 2006, VITA included 60 volunteers, mostly Duke Law students, some Duke Law faculty/administrators, and some NCCU law students. Many volunteers were proficient in Spanish and other languages, and a significant portion of the clientele was Spanish-speaking. The volunteers served 300 clients and worked at sites as diverse as the Duke Federal Credit Union, the Durham Rescue Mission, and El Centro Hispano in downtown Durham. Zia was active in VITA for all three years of law school—as a volunteer, as a member of the Executive Board, and finally as president. As leader of the program in her third year, she increased the number of clients served by 20%. Zia also served the community through Duke Law's Community Enterprise Clinic. One of her law school summers, she worked at the Bazelon Center for Mental Health Law. In September, Zia began a two-year clerkship with Judge Gregory Carman and the Court of International Trade in NYC.

Wake Forest University School of Law has nominated **Devon J. Green**. Devon volunteered as a guardian ad litem and also volunteered in Wake Forest's Domestic Violence Advocacy Clinic. Not only did she participate in these established programs, but also took the lead in new public service ventures. Devon sought out a group of law students to volunteer with local teens, and she was able to reactivate the law school's Teen Court program. Devon also organized a new program, Kickball for Kids, to provide a day of outdoor fun each spring for kids who were on a waiting list for a Big Brother or a Big Sister. In the fall of 2005, Devon helped raise over $7,000 in hurricane relief for the Red Cross. Each October she was a driving force behind Wake Forest's Public Interest Law Organization's auction, which raises money for summer stipends for law students involved in public interest work. After graduation, Devon will be working for Legal Services in Vermont ■

In Memoriam

Frank C. Ausband
Kernersville (Deceased 2006)

Billy Robert Barr
Mount Airy (1933-2006)

Jennifer L. Bowman
New Bern (Deceased 2006)

Richard L. Braun
Raleigh (Deceased 2006)

John T. Chaffin
Elizabeth City (Deceased 2006)

James A. Cole Jr.
Durham (Deceased 2006)

Claude Q. Freeman Jr.
Charlotte (Deceased 2006)

James P. Green Jr.
Garner (1958-2006)

Robert C. Howison Jr.
Raleigh (1915-2006)

Herbert L. Hyde
Asheville (Deceased 2006)

Samuel G. Layton Jr.
Charlotte (Deceased 2006)

William C. Palmer
Lenoir (Deceased 2006)

Allison S. Satterwhite
Charlotte (Deceased 2006)

William W. Staton
Sanford (Deceased 2006)

Resolution of Appreciation of Calvin E. Murphy

WHEREAS, Calvin Murphy was elected by his fellow lawyers from the 26th Judicial District in January 1995 to serve as their representative in this body. Thereafter he was elected for three successive three-year terms as councilor; and

WHEREAS, in October 2003 Calvin Murphy was elected vice-president, and in October 2004 he was elected president-elect. On October 21, 2005, he was sworn in as president of the North Carolina State Bar; and

WHEREAS, during his service to the North Carolina State Bar, Calvin Murphy has served on the following committees: Consumer Protection; Membership and Fees; Legal Aid to Indigents; Budget, Finance, and Audit; Grievance; Appointments; Committee to Monitor Lawyer Advertising; Grievance Procedures Review; Authorized Practice; Executive; Client Assistance; Ethics; Emerging Issues; Legislative; and the Disciplinary Review Committee; and

WHEREAS, although Calvin Murphy has certainly provided resolute and inspirational leadership to the council during his year as president, it may well be reckoned that his finest hour occurred during his year as president-elect, for it was during that critical time that he was called upon to restore the credibility of the State Bar by examining its handling of a disciplinary case that had become the subject of intense public criticism and media scrutiny. In chairing the Disciplinary Review Committee, Mr. Murphy invested a painstaking process with his personal integrity and common sense, leading the committee to conclusions and recommendations that were wise and therapeutic. Indeed, it is unlikely that anyone in recent memory has rendered a more valuable service to the Bar; and

WHEREAS, Calvin Murphy, during his tenure as an officer and particularly during his year as president, consistently asserted the importance of having lawyers from all segments of the Bar, including women and racial minorities, participate in the profession's regulation of itself. He boldly and convincingly demonstrated his commitment to diversity through appointment and proclamation, making it clear that a self-regulating profession can no longer afford to do without the talents of its entire membership; and

WHEREAS, Calvin Murphy, being a native of Mecklenburg County and a pillar of the Mecklenburg County Bar, also undertook to expose the many lawyers in that remote province to the mysteries and realities of self-regulation by holding a meeting of the State Bar Council in Charlotte. In April 2006, for the first time in nearly 30 years, the council convened in the Queen City and the lawyers there were able to witness locally the important deliberations being undertaken on their behalf. Thanks to Calvin Murphy, immense goodwill and increased understanding were thereby engendered; and

WHEREAS, during his presidency, Calvin Murphy faithfully superintended the gestation and implementation of a great many new regulatory requirements. On his watch, lawyers appearing pro hac vice were registered, lawyers seeking comity admission were allowed to practice, and prosecutors receiving lawful requests for discovery were required to make "reasonably diligent inquiry" before responding; and

WHEREAS, Calvin Murphy, by means of his imposing physical stature, his incomparable voice, and his considerable moral authority, led the North Carolina State Bar with unequaled style and sureness of purpose, never faltering in the face of adversity, never stinting in his support of the staff, and never relenting in his devotion to the legal profession.

NOW, THEREFORE, BE IT RESOLVED that the council of the North Carolina State Bar does hereby publicly and with deep appreciation acknowledge the strong, effective, and unselfish leadership of Calvin Murphy and expresses to him its debt for his personal service and dedication to the principles of integrity, trust, honesty, and fidelity.

BE IT FURTHER RESOLVED that a copy of this resolution be made a part of the minutes of the annual meeting of the North Carolina State Bar and that a copy be delivered to Calvin Murphy.

Client Security Fund Reimburses Victims

At its October 19, 2006, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of $122,580.18 to 40 clients who suffered financial losses due to the misconduct of North Carolina lawyers.

The payments authorized were:

1. An award of $775.50 to a former client of Zachary T. Bynum of Winston-Salem, North Carolina. The board found that Bynum's associate was retained to defend the client in a civil matter, and the client's retainer was held in Bynum's trust account. Bynum failed to refund the unearned portion of the fee. Bynum was disbarred on April 23, 2004.

2. An award of $2,500.00 to a former client of Deborah G. Church of Mooresville, North Carolina. The board found that Church was retained to handle a case involving alienation of affections and criminal conversation and failed to provide any valuable legal services for the fee paid. Church was disbarred on July 1, 2005.

3. An award of $34,400.00 to the estate of a former client of Deborah G. Church. The board found that Church misappropriated the client's funds while acting as the client's power of attorney.

4. An award of $1,500.00 to a former client of Deborah G. Church. The board found that Church was retained to attempt to get the client's driver's license restored and failed to provide any valuable legal services for the fee paid.

5. An award of $1,200.00 to a former client of R. Dawn Gibbs of Gibsonville, North Carolina. The board found that Gibbs was retained to represent the client in DWI and underage drinking charges and failed to provide any valuable legal services on the client's behalf. Gibbs was transferred to disability inactive status on November 16, 2005.

6. An award of $500.00 to a former client of R. Dawn Gibbs. The board found that Gibbs was retained to represent the client on a speeding charge and failed to provide the client with any beneficial legal services prior to Gibbs' transfer to disability inactive status.

7. An award of $200.00 to a former client of R. Dawn Gibbs. The board found that Gibbs was retained to handle a traffic matter and failed to provide any valuable legal services on the client's behalf.

8. Awards totaling $11,560.00 to 27 former clients of Joseph W. Morton of Jacksonville, North Carolina. The board found that Morton was retained to handle traffic matters for these clients and failed to provide any beneficial legal services for the fees paid. Morton was disbarred on July 21, 2006.

9. Awards totaling $51,950.00 to two former clients of Stafford Allen Patterson II of Cary, North Carolina. The board found that Patterson was retained to handle a loan closing for the two clients. Patterson wrote checks payable to the IRS and the North Carolina Department of Revenue and forwarded the checks to the CPA who had been negotiating with the taxing authorities on behalf of the clients. Patterson thereafter closed his trust account, and the checks were returned for insufficient funds. Patterson was disbarred on September 14, 2004.

10. An award of $400.00 to a former client of Frank G. Pinkston of Winston-Salem, North Carolina. The board found that Pinkston was retained to investigate a possible civil claim against a night club. Pinkston failed to take any known steps to investigate the client's claim. On August 3, 2006, Pinkston was suspended from the practice of law for two years, with a possible 18-month stay.

11. An award of $16,794.68 to a former client of Paul Ryan Schell of Charlotte, North Carolina. The board found that Schell was retained to handle a personal injury matter and misappropriated a portion of the settlement proceeds. Schell was disbarred on September 21, 2006.

12. An award of $400.00 to a former client of Paul Ryan Schell. The board found that Schell was retained to represent the client at a child support hearing. Schell failed to appear in court on the client's behalf.

Thank You to Our Annual Meeting Sponsors

Attorneys Title Insurance Agency, Inc.
for sponsoring the Councilors' Reception

Chicago Title Insurance Company
for sponsoring the wine at the Councilor's Dinner

North Carolina Lawyers Weekly
for sponsoring the President's Reception

LexisNexis
for sponsoring the President's Reception

13. An award of $400.00 to a former client of Paul Ryan Schell. The board found that Schell was retained to represent the client in a domestic matter and failed to provide any valuable legal services for the legal fees paid.

Addiction Treatment (cont.)

sponsored CLE on the subject of substance abuse. You have standing to demand that what you are paying for, and are required to listen to, reflects science, medicine, and research, not religious dogma. Talk to your judicial district councilors and let them know what you think. ■

Alan V. Pugh has been in private practice in Asheboro for 30 years with Gavin Cox Pugh and Wilhoit LLP.

2007 Appointments to Boards and Commissions

January Council Meeting

Lawyer Assistance Program Board (3-year terms) There are three appointments to be made. Joe C. Coulter and Victor J. Boone are not eligible for reappointment. Fred J. Williams is eligible for reappointment.

April Council Meeting

Disciplinary Hearing Commission (3-year terms) There are three appointments to be made. Stephen E. Culbreth and F. Lane Williamson are not eligible for reappointment. Tommy W. Jarrett is eligible for reappointment.

July Council Meeting

Board of Legal Specialization (3-year terms) There are three appointments to be made. Thomas R. Crawford is not eligible for reappointment. Edward P. Tewkesbury and Dr. Robert E. Gaddy are eligible for reappointment.

IOLTA Board of Trustees (3-year terms) There are three appointments to be made. Robert A. Wicker, Larry S. McDevitt, and Jean P. Hollowell are eligible for reappointment.

Commission on Indigent Defense Services (4-year terms) There is one appointment to be made. Richard G. Roose is eligible for reappointment.

October Council Meeting

Board of Continuing Legal Education (3-year terms) There are three appointments to be made. Keith O. Gregory, Gary W. Thomas, and Cynthia L. Turco are eligible for reappointment.

Board of Law Examiners (3-year terms) There are five appointments to be made. Susan F. Olive is not eligible for reappointment. Catherine E. Thompson, Gail C. Arneke, Randel E. Phillips, and Emil F. Kratt are eligible for reappointment.

Board of Paralegal Certification (3-year terms) There are three appointments to be made. J. Michael Booe, Marisa S. Campbell, and Sharon L. Wall are eligible for reappointment.

Client Security Fund (5-year terms) There is one appointment to be made. Henry L. White is not eligible for reappointment.

NC LEAF (1-year term) There is one appointment to be made. Victor J. Boone is eligible for reappointment. ■

Rule Amendments (cont.)

from depository institutions by reason of interest earned on trust accounts established by lawyers pursuant to Rule 1.15-4 of the Revised Rules of Professional Conduct, voluntary contributions from lawyers, and interest, dividends, or other proceeds earned on the board's funds from investments or from other sources intended for the provision of legal services to the indigent and the improvement of the administration of justice.

27 N.C.A.C. 2, Rules of Professional Conduct

Rule 1.15-4, Interest on Lawyers' Trust Accounts

(a) Pursuant to a plan promulgated by the North Carolina State Bar and approved by the North Carolina Supreme Court, a lawyer may elect to create or maintain an interest-bearing trust account for those funds of clients which, in the lawyer's good-faith judgment, are nominal in amount or are expected to be held for a short period of time....

(b) Lawyers or law firms electing to deposit client funds in a general trust account under the plan shall direct the ~~depository institution~~ bank:

(1) to remit interest or dividends, as the case may be (less any deduction for bank service charges, fees ~~of the depository institution~~, and taxes collected with respect to the deposited funds) at least quarterly to the North Carolina State Bar;

(2) ....

(c) As used herein, "Confidential Information" means all information regarding IOLTA account(s) other than (1) a lawyer's or law firm's status as a participant, former participant, or non-participant in the IOLTA program, and (2) information regarding the policies and practices of any bank in respect of IOLTA trust accounts, including rates of interest paid, service charge policies, the number of IOLTA accounts at such bank, the total amount on deposit in all IOLTA accounts at such bank, the total amounts of interest paid to the IOLTA program, and the total amount of service charges imposed by such bank upon such accounts.

Confidential Information shall not be disclosed by the staff, or trustees of NC IOLTA to any person or entity, except that Confidential Information may be disclosed (1) to any chairperson of the grievance committee, staff attorney, or investigator of The North Carolina State Bar upon his or her written request specifying the information requested and stating that the request is made in connection with a grievance complaint or investigation regarding one or more trust accounts of a lawyer or law firm; or, (2) in response to a lawful order or other process issued by a court of competent jurisdiction, or a subpoena, investigative demand, or similar notice issued by a federal, state, or local law enforcement agency.

~~(c)~~ (d) ....

[Re-lettering remaining paragraphs.] ■

Annual Reports of State Bar Boards

Board of Paralegal Certification

The program to certify paralegals continues to be enthusiastically embraced by North Carolina paralegals. The board accepted the first application for certification on July 1, 2005. Fifteen months later, over 2300 applications have been received by the board and, after review to determine that the education, work experience, and character standards were met, the board has certified over 2,000 applicants as North Carolina Certified Paralegals. At a meeting on October 18, 2006, the board had the opportunity to recertify over 300 paralegals upon the first anniversary of their initial certification.

The period in which applicants may qualify without taking an examination will end on June 30, 2007. In preparation, the Certification Committee of the board has worked with a professional psychometrician to insure that the exam the board administers is valid and reliable. Several paralegals who are already certified have volunteered to "road test" the exam for quality assurance. Paralegals who are certified upon successful passage of the exam will have demonstrated knowledge in those practice areas and skills that are necessary to provide competent assistance to lawyers.

Over the past year, the board has continued to develop procedures and adopt policies as necessary for this nascent program. The board has accomplished the following

- Published for comment rules that provide for a nominating committee to identify the nominees whose names will be submitted to vote by all CPs for a paralegal vacancy on the board; clarify the educational standard for certification; and create a procedure for reconsideration of denied applications.
- Established a panel of the board to hear appeals from denials of certification.
- Through the board's committees and staff, evaluated and accredited continuing paralegal educational activities and publicized and explained the certification program.
- Designated 21 North Carolina paralegal studies programs as qualified paralegal studies programs under the Plan, in addition to the four North Carolina programs that are currently approved by the ABA.

As promised in last year's annual report, the board has kept pace with the applications that it receives and the program continues to attract qualified applicants. Also, as promised, the program is operating in the black and generating enough excess revenue to cover the costs of developing a quality certification examination. At the beginning of 2005, the council allocated $50,000 as "seed money" to the paralegal certification program. The board intends to repay the remainder of that money this year.

We are also pleased to report that a number of states—including New York, Florida, Indiana, and Ohio—have adopted or are considering the adoption of certification programs that incorporate substantial portions of the North Carolina Plan for Certification of Paralegals. The board believes in the value of this program and is prepared to cooperate and provide assistance to other states as they begin their own programs.

The purpose of certifying paralegals is set forth as follows in Rule .0101 of the Plan:

> to assist in the delivery of legal services to the public by identifying individuals who are qualified by education and training and have demonstrated knowledge, skill, and proficiency to perform substantive legal work under the direction and supervision of a licensed lawyer, and including any individual who may be otherwise authorized by applicable state or federal law to provide legal services directly to the public; and to improve the competency of those individuals by establishing mandatory continuing legal education and other requirements of certification.

The importance of this program to paralegals continues to be evident in the response that the board has received. The board firmly believes that the importance of the program to the lawyers who employ paralegals, and to their clients, will be borne out over time.

Board of Legal Specialization

It has been another successful year for the State Bar's specialization program. In the spring, we received 92 applications from lawyers seeking certification. This is the fourth year in a row in which more than 50 lawyers will sit for the certification exams.

In 2006, we are offering, for the first time, certification in social security disability law. I am pleased to report that 35 lawyers will sit for the examination in social security disability law in November.

Also this year for the first time we are administering the American Board of Certification's bankruptcy examination. Successful applicants will have dual certification from both the North Carolina State Bar Board of Legal Specialization and the American Board of Certification.

We continue to study the demographics of our applicant pool. In 2006, approximately half of our applicants came from small firms (two to nine lawyers) in metropolitan areas. At least a fourth of the applicants are lawyers who have 21 plus years of experience.

Once certified, specialists rarely allow their certification to lapse. In January, the board recertified 103 lawyers in their chosen areas of certification, and this fall we received 90 applications for recertification. Many of these lawyers have been board certified specialists for 15 years.

The board continues to educate the pubic and lawyers about the value of legal specialization. In the spring, we published our annual directory of certified specialists. In addition, the State Bar *Journal* featured interviews with board certified specialists Kate Dreher, assistant district attorney from Asheville, who is certified in criminal law; Garth Dunklin from Charlotte who is certified in real property law; Dan Walden from Winston-Salem who is certified in workers' compensation law; and Cynthia Aziz from Charlotte who is certified in immigration law.

At the annual luncheon for certified specialists, the board inaugurated three special recognition awards that will be presented annually to outstanding specialists. The awards were named in honor of three past

chairs of the Board of Legal Specialization in recognition of their unique contributions to the development and expansion of the specialization program. The Howard L. Gum Excellence in Committee Service Award is given to a specialty committee member who consistently excels in completing committee tasks, is highly dedicated to legal specialization, donates his/her time to committee responsibilities, and responds to the needs of the staff and the board in an exemplary fashion. This award was presented to Christine L. Myatt, also a past chair of the board and a current member of the Bankruptcy Specialty Committee.

The James E. Cross Jr. Leadership Award is presented to a certified specialist who has taken an active leadership role in his/her practice area through presentations at CLE seminars, scholarly writings, participation in groundbreaking cases, or service to an established professional organization. Joseph B. Cheshire V from Raleigh received the James E. Cross, Jr. Leadership Award for his contribution to the practice of criminal law.

The Sara H. Davis Excellence Award, named in honor of Councilor Sara Davis, is given to a certified specialist who exemplifies excellence in his/her daily work as an attorney and serves as a model for other lawyers. Special consideration is given for a long and consistent record of handling challenging matters successfully, for sharing knowledge and experience with other lawyers, for earning the respect and admiration of those with whom the lawyer comes into contact in his/her daily work, and for high ethical standards. Maria M. Lynch, a specialist in estate planning law and a former State Bar Councilor from Raleigh, was presented with the Sara H. Davis Excellence Award.

The board recently welcomed two new board members: Carl W. Davis Jr., a public member from Raleigh who is the assistant general manager for UNC Center for Public Television, and Jeri L. Whitfield, a board certified specialist in workers' compensation from Greensboro. While the board is grateful for these excellent appointments to the board, it is with much regret that we say goodbye to the two board members whose terms have expired: chair Frank Martin, a real property specialist from Wilmington, and public member Karen Golden, retired IBM public relations executive. Special resolutions of appreciation were adopted by the board for both Frank and Karen.

Finally, the board is currently making plans for the celebration in 2007 of the 20th anniversary of the first class of North Carolina legal specialists. Please look for more information about our anniversary events in the coming months.

Board of Continuing Legal Education

Our success at monitoring and enforcing compliance with the CLE rules continues to improve. Ninety-seven percent of the active members of the North Carolina State Bar were in compliance with the mandatory CLE requirements for 2005. By mid- March 2006, the CLE department processed and filed over 20,000 annual report forms for the 2005 compliance year. A reminder postcard sent to lawyers two weeks before the February 28th deadline helped significantly to cut down on the number of delinquent annual report forms. North Carolina lawyers took about 290,000 hours of CLE in 2005, or approximately 14.5 CLE hours per lawyer—2.5 hours above the mandated 12 CLE hours per year. The majority of outstanding compliance issues from 2005 will be resolved by the end of 2006.

In March 2006, the Supreme Court approved two important rule amendments for the CLE program. One amendment reduces the number of lawyers who must be present at a video replay from five to three. This change will help lawyers in rural areas to attend quality CLE programs on video without the expense and inconvenience of traveling outside of their communities. The other rule amendment will allow a lawyer to adjust his CLE record after filing the annual report form as long as the lawyer shows good cause on or before July 31. This change preserves administrative finality for CLE records for the preceding year while allowing lawyers to make adjustments when appropriate.

We are waiting for the Supreme Court's approval of two additional rule changes. These changes allow lawyers to receive CLE credit for teaching certified paralegal education programs and grant more CLE credit to lawyers who teach part time at a law school. Both amendments will encourage lawyers to share their knowledge with others.

One of the board's most important initiatives this year was the drafting of standards for accreditation of courses on law practice management, skills training, and technology. The proposed rule amendments incorporating these standards are before the council at this time for approval to publish for comment. Many management, skills training, and technology programs have little or nothing to do with the practice of law. The rule amendments will clarify for providers that CLE credit will only be granted to courses that have as their primary objective increasing the participant's professional competence and proficiency as a lawyer.

With the completion of enhancements to our computer programming and accounting systems, the CLE department now issues quarterly statements to sponsors of CLE programs. A sponsor's quarterly statement clearly explains any outstanding balance or overpayment of attendance fees. At the end of each compliance year, a yearly statement is issued to each sponsor, thereby allowing the financial record for each compliance year to be finalized.

The CLE website, www.nccle.org, will soon have a new look. More and more members are relying upon the site to view their "real time" CLE transcripts and to locate appropriate CLE courses on the online course database. As a new feature, from the end of January through mid-March 2007, lawyers will be able to download a PDF version of the 2006 annual report form.

After six productive years, Dan Dean is leaving the board. Dan joined the board in 2000 and has been its chairman since 2003. His leadership was instrumental to the implementation of sound compliance procedures that ensure that lawyers who fail to comply with the requirements of the CLE program are properly notified and continued noncompliance is appropriately addressed. Dan will be sincerely missed by the other members of the board and by the staff.

Client Security Fund

The fund was established by order of the Supreme Court dated October 10, 1984, and commenced operations January 1, 1985. As stated by the Supreme Court, the purpose of the Fund is "...to reimburse, in whole or in part in appropriate cases and subject to the provisions and limitations of the Supreme Court and [the] Rules, clients who have suffered financial loss as a result of dishonest conduct of lawyers engaged in the private practice of law in North Carolina...."

Claims Procedures

The fund reimburses clients of North Carolina attorneys when there was wrongful

taking of the clients' money or property in the nature of embezzlement or conversion, which money or property was entrusted to the attorney by the client by reason of an attorney/client relationship or a fiduciary relationship customary to the practice of law. Applicants are required to show that they have exhausted all viable means to collect those losses from sources other than the fund as a condition to reimbursement by the fund.

Specific provisions in the rules declare the following types of losses to be nonreimbursable:

1. Losses of spouses, parents, grandparents, children, siblings, partners, associates, or employees of the attorney.

2. Losses covered by a bond, security agreement, or insurance contract, to the extent covered.

3. Losses by any business entity with which the attorney or any person described in paragraph one above is an officer, director, shareholder, partner, joint venturer, promoter, or employee.

4. Losses which have been otherwise reimbursed by or on behalf of the attorney.

5. Losses in investment transactions in which there was neither a contemporaneous attorney/client relationship nor a contemporaneous fiduciary relationship.

All reimbursements are a matter of grace in the sole discretion of the board and not a matter of right. Reimbursement may not exceed $100,000 to any one applicant based on the dishonest conduct of an attorney.

The Board of Trustees

The board is composed of five trustees, each appointed by the council of the State Bar for a term of five years. A trustee may serve only one full five-year term. Four of the trustees must be attorneys admitted to practice law in North Carolina and one must be a person who is not a licensed attorney. Current members of the Board are:

William O. King, a partner with the firm Moore & Van Allen PLLC in Durham, North Carolina.

Henry L. White, the public member of the board, is a CPA and partner with the accounting firm of Stancil and Company in Raleigh, North Carolina.

Fred H. Moody Jr., a partner with the firm McKeever, Edwards, Davis and Hayes, PA, in Bryson City, North Carolina.

Janice McKenzie Cole, Cole Immigration Law Center in Hertford, North Carolina.

G. Thomas Davis Jr., with the firm Davis and Davis in Swan Quarter, North Carolina.

Subrogation Recoveries

It is standard procedure to send a demand letter to each attorney or former attorney whose misconduct results in any payment, making demand that the attorney either reimburse the fund in full or confess judgment and agree to a reasonable payment schedule. If the attorney fails or refuses to do either, suit is filed unless the investigative file clearly establishes that it would be useless to do so.

In cases in which the defrauded client has already obtained a judgment against the attorney, the fund requires that the judgment be assigned to it prior to any reimbursement. In North Carolina criminal cases involving embezzlement of client funds by attorneys, State Bar counsel, working with the district attorney, is frequently able to have restitution ordered as part of the criminal judgment.

Another method of recovering amounts the fund pays to clients of a dishonest attorney is by being subrogated to the rights of clients whose funds have been "frozen" in the attorney's trust account during the State Bar's disciplinary investigation. When the court disburses the funds from the trust account, the fund gets a *pro-rata* share.

During the year covered by this report, the Fund recovered $10,794.16 as a result of these efforts. Hopefully, our efforts to recover under our subrogation rights will continue to show positive results.

Claims Decided

During the period October 1, 2005-September 30, 2006, the board decided 300 claims, compared to 140 claims decided the previous reporting year. Those 300 claims were based upon allegations of dishonest conduct by a total of 55 attorneys or former attorneys. As filed, they totaled $2,215,124.88. For various reasons under its rules, the board denied 88 of the 300 claims in their entirety. Of the 212 remaining claims, involving 25 attorneys or former attorneys, some were paid in part and some in full. Reimbursements of those 212 claims totaled $396,038.90, an average of $1,868.11 per claim. The largest amount paid on a single claim was $100,000.00, and the smallest amount paid was $75.00.

The most common basis for denying a claim in its entirety is that the claim is a "fee dispute" or "performance dispute." That is, there is no allegation or evidence that the attorney embezzled or misappropriated any money or property of the client. Rather, the client feels that the attorney did not earn all or some part of the fee paid or mishandled or neglected the client's legal matter. However meritorious the client's contentions may be, the fund is not permitted to reimburse the clients in those cases because of the requirement in the rules that a wrongful taking of money or property in the nature of embezzlement or conversion must be shown.

Funding

The 1984 order of the Supreme Court that created the fund contained provisions for an assessment of $50.00 to provide initial funding for the program. In subsequent years, upon being advised of the financial condition of the fund, the Court in certain years waived the assessment and in other years set the assessment in varying amounts to provide for the anticipated needs of the fund.

In 1999, the Supreme Court approved a $20 assessment per active lawyer that was to continue from year to year until circumstances required a modification. For the past two years, due to significant embezzlements by a small number of attorneys, a modification was required and a $50 assessment was ordered.

The $50 assessment ordered last year was expected to pay all anticipated claims and leave a fund balance above the minimum required. The fund paid less than anticipated last year, increasing last year's anticipated ending balance. As a result, a special $50 assessment is not needed for the coming year. However, given the average of claims for the past ten years, returning to a $20 annual assessment was not adequate. Thus, the board has asked the Supreme Court to return to an annual assessment, but to increase it to $25.

Conclusion

The Board of Trustees wishes to convey to the council our sincere appreciation to the staff personnel who have assisted us so effectively and generously during the past year. Without the continuous support of these people, our tasks would be much more difficult. We also express our appreciation to the Bar of North Carolina for their continued support of the Client Security Fund and their efforts in reducing the incidents of defalcation on the part of a few members of our profession.

Lawyer Assistance Program

It has been a busy and productive year for

the LAP. The State Bar rules governing the Lawyer Assistance Program provide:

.0601 Purpose

The purpose of the lawyer assistance program is to: (1) protect the public by assisting lawyers and judges who are professionally impaired by reason of substance abuse, addiction, or debilitating mental condition; (2) assist impaired lawyers and judges in recovery; and (3) educate lawyers and judges concerning the causes of and remedies for such impairment.

The LAP is fulfilling its mission. Since 2000 the LAP has assisted over 1,100 lawyers, or around 5% of the bar—often including those most disadvantaged and distressed members.

There have been distractions. In December 2004, a lawyer from Asheboro wrote then Bar President Bud Siler and alleged that referrals by the LAP to AA programs were not constitutionally permissible. At the request of the officers, the LAP Board undertook a review of the law and the practices of the LAP in regard to establishment clause issues and on October 1, 2005, it adopted a policy entitled: "LAP Guidelines to Avoid Conflict With the Establishment Clause." At the same time, the LAP Board asked if the services of an outside law firm could be obtained to opine as to the constitutionality of the practices of the LAP. President Murphy obtained the service *pro bono* of Adam H. Charnes and Chad D. Hansen of Kilpatrick Stockton to provide an opinion to the Bar for the benefit of the LAP.

Concerned about the allegations, the Bar officers in the fall of 2005 directed Bar discipline lawyers to refrain from involving the LAP in cases as it had in the past, where LAP worked with and monitored lawyers whose problematic behavior arose out of addiction or mental health issues. On November 9, 2005, a lawsuit was filed against Ed Ward, Assistant LAP Director, and Harold Lilly, an addictions counselor in Asheboro, alleging establishment clause rights were violated. The suit was also against Fellowship Hall, one of the treatment centers where the plaintiff was a patient for addiction treatment. The suit against Fellowship Hall was dismissed by the court on March 17, 2006. After much written discovery and following the dismissal of the suit against Fellowship Hall on the merits, a dismissal was taken of the second lawsuit against Ed Ward and Harold Lilly.

In early May, the opinion of Charnes and Hansen was received by the LAP Board. This opinion found the practices of the LAP to be constitutional and made suggestions to strengthen those policies.

At its July 2006 meeting, the LAP Board reviewed the Charnes and Hansen suggestions and revised the LAP's policies in a manner felt to be most constructive in dealing with any possible establishment clause challenges.

After overcoming software difficulties that had hindered the closing of files, the LAP closed 773 files during the year. For the first time, we can provide a summary of the results achieved by the LAP. The bottom line is that in files closed since 2000, the rate of successful outcomes is 84 %.

At the end of October, the LAP had 379 open files. This reflects that more than one new file is opened every day, requiring very substantial amounts of time from the professional staff as well as our cadre of volunteers. These staff and volunteer efforts prevented or limited possible harm to the public in numerous incidents. Although referrals from the DHC and Grievance Committee were suspended for most of this year, there have been positive outcomes in the great majority of all cases being monitored by the LAP for either the Grievance Committee or pursuant to a DHC Order this past year. In these cases, where discipline is initially deferred or the lawyer is operating under a stayed suspension, the LAP's intervention offers the opportunity to resolve the root problem from which the discipline problem arose. The mission of protecting the public is vitally served.

Details of the North Carolina Lawyer Assistance Program

The Lawyer Assistance Program (LAP) provides assessment, referral, intervention, education, advocacy, and peer support services for North Carolina lawyers and judges.

The LAP is designed to help lawyers find a way to address a wide range of health and personal issues, including, most commonly, alcohol/drug abuse, stress/burnout, depression, anxiety, and compulsivity disorders of all kinds, including those involving food, sex, gambling, and the Internet.

All calls are strictly confidential.

Educational Outreach

The Lawyer Assistance Program sponsored several presentations and video presentations across the state in 2005-2006.

LAP Information Flyers

- PALS: Alcoholism and Other Chemical Addictions
- FRIENDS: Depression and Mental Health
- A Guide for North Carolina Judges: Dealing with an Impaired Lawyer
- Black Lawyers Association Leadership Urges Members Use of Lawyer Assistance Program
- Breaking the Silence - Lawyer Suicide
- A Chance to Serve
- Welcome to the Legal Profession
- Women Bar Leaders Encourage Use of Lawyer Assistance Program
- Impairment in the Legal Profession - A Guide for New Bar Councilors and Local Bar Leaders

LAP flyers are used in new lawyer packages, volunteer packages, and requests for information by prospective clients and in CLE programs. Approximately 700 flyers were distributed in 2005 and 2006 at presentations. 1,327 Welcome Flyers were distributed to new admittees. The LAP book "A Lawyer's Guide to Healing" is being distributed as part of the LAP's outreach.

A new flyer has been approved by the board to be printed in 2007.

Articles

PALS and FRIENDS columns are submitted quarterly to the Bar *Journal*. Monthly articles are submitted to the *Campbell Law Observer* to develop awareness of the Lawyer Assistance Program and impairing issues lawyers may face.

Volunteer Development

Substantial efforts continue to be devoted to volunteer development. As of September 30, 2005, there were 127 PALS volunteers and 101 FRIENDS volunteers.

Training

The 26th Annual PALS Meeting and Workshop was held on September 30 - October 2, 2005, in Hendersonville, NC. Guest speakers included Jim Emmert, Robert Turnbull and Mary Howerton.

The FRIENDS Annual Conference was held on February 11, 2006 at the Grandover Resort, Greensboro, North Carolina.

The 27th PALS Annual Conference and Workshop will be held at Carolina Beach, North Carolina on November 3-5, 2006.

ABA CoLAP Conference will be held in

San Francisco, California on October 24-27, 2006.

Upcoming Events for 2007

FRIENDS 8th Annual Conference will be held on February 10, 2007, at Mid Pines, Southern Pines, NC. The 2007 conference will be a joint program with BarCares and the Quality of Life Committee of the North Carolina Bar Association.

11th Annual Step Study Retreat for Lawyers in Recovery will be held at the Summit at Haw River State Park on May 4-6, 2007.

Local Volunteer Meetings:

The Lawyer Assistance Program continues the development of local volunteer meetings to provide greater continuity and support in meeting the needs of lawyers new in recovery and allowing volunteers the chance to grow in their own recoveries. Local volunteer support meetings for PALS and FRIENDS are held in several locations. Details on meeting locations are available on the LAP website— www.nclap.org.

Volunteer Communication

The Lawyer Assistance Program sends out *The Intervenor*, a newsletter, to all PALS volunteers three to four times a year to enhance communication among the volunteer network. Volunteers have contributed by writing articles for *The Intervenor* and by sharing personal stories in the CLO and the State Bar *Journal*.

Case Management

Case management has four different stages:

1. Investigation - Initial contact with the program begins the investigative phase. All efforts at this stage are directed to determining if the lawyer has a problem with which LAP can assist, the nature of the problem, and if the client is willing to get assistance.

2. Treatment/Stabilization - This phase begins when a lawyer understands that he/she needs help and agrees to obtain assistance.

3. Monitoring/Aftercare - This begins when a lawyer has completed inpatient/outpatient treatment or initial therapy consultations and is stabilized in a recovery program. In this stage, the volunteer support is most active and helpful.

4. Inactive Status - A file is placed on inactive status when the active role of the LAP terminates. This may occur when the lawyer completes an initial two-year contract of monitoring and no longer needs a monitor, lawyer dies, moved out of state, is disbarred, or no longer wants any assistance.

Case Management Statistics

Statistics about the program reflect the number of people getting help; they do not reflect the time it takes to deliver that assistance. A self-referral might be appropriate for a phone evaluation and be immediately directed to a treating counselor to meet his/her needs. On the other hand, a third party initiated investigation may take weeks to complete and, even then, the file may be put on hold for months in order for there to be sufficient opportunity to ascertain if the lawyer truly needs assistance. Every effort is made not to interfere by offering assistance unless there is meaningful evidence suggesting that it is needed or the lawyer is actively seeking help. Even then, in the addictions area, assistance when offered is often refused at first and the LAP may spend months building up trust so that assistance can be received when the lawyer finally becomes receptive. Like cases in law practice, the problem cases can often take tremendous amounts of time to move forward. Our approach is never to give up on offering help, but often that means waiting until a situation ripens. The LAP brought a new professional clinician on board in April 2005, Towanda Garner, LAP Piedmont Coordinator. To be able to make client access to the LAP easier, the state of North Carolina is divided into three sections. Don Carroll handles cases in the western part of the state. Towanda Garner handles the Piedmont section, and Ed Ward the eastern part of the state. Of course, any lawyer may seek the help of any member of the professional staff. The continued expansion and utilization of trained volunteers will remain key in the future to bringing assistance to more lawyers who need it.

Outcome Data

We finally have outcome numbers that include all of the cases that we have handled since 2000. The cases that have been coded as successfully handled are a broad category that emphasizes help to the lawyer. First and foremost this includes cases where the client had a significant problem, entered into a recovery contract with the LAP, and successfully completed the contract. In addition, it includes cases where there was informal assistance given and a positive result achieved for the lawyer. This category also includes cases where an investigation was made, or the client contacted and offered assistance, and it was determined that no further action was needed on the client's behalf, as well as cases that were investigated, the investigation was inconclusive as to the need for assistance, and the case was closed after two years when it appeared that no help was needed. The success category does not include lawyers who died, went on disability status, were disbarred, or moved out of state. While these categories reflect elimination of potential harm to the public, they do not show that a lawyer was actually helped. More significantly, the category of unsuccessful outcomes includes cases where a contract was entered into and the client failed in his or her efforts to achieve recovery; cases where a client went to treatment; left treatment and did not pursue recovery; and cases found unsuitable for the LAP to provide assistance.

Since 2000, there have been 773 active case files closed. Of these, a successful outcome was obtained in 647 and an unsuccessful outcome occurred in 126, for a favorable success rate of 84%. Of the closed cases, 435 were for addiction issues, 20 for addiction and mental health, and 318 for mental health. For the addiction cases there is a success rate of 88%; for the addiction and mental health cases, a success rate of 65%; and for mental health cases a success rate of 83%.

The LAP is currently handling 379 files. There are 185 PALS and 194 FRIENDS files.

PALS Referrals:	**FRIENDS Referrals:**
BOLE - 10	BOLE - 1
Friend - 2	Friend - 1
Family- 7	Family - 3
DHC - 3	DHC - 6
Bar Staff - 11	Bar Staff - 12
Lawyer - 60	Lawyer - 43
Self - 62	Self - 98
Firm - 6	Grievance - 18
Judge - 7	Firm - 5
DA - 1	Another LAP - 1
Another LAP - 4	Unknown - 2
Bar Examiner - 2	Judge - 3
Grievance - 7	Therapist - 1
Unknown - 7	EAP - 1

Governance

Under the rules of the NC State Bar, the Lawyer Assistance Program is governed by a nine-member board. The NC State Bar

Council appoints the members of the Lawyer Assistance Program Board in three different categories: Three are councilors of the NC State Bar; three are persons with experience and training in the fields of mental health, substance abuse, and addiction; and three are bar members who currently serve as volunteers to the Lawyer Assistance Program. In order to avoid any perception that the LAP Program is not entirely separate from discipline, no member of the Grievance Committee may serve on the LAP Board. The current members of the LAP Board are: Victor Boone, chair, LAP and councilor; Samuel F. Davis Jr., vice-chair, LAP and councilor; Sara Davis, councilor and board member; Terry Sherrill is a volunteer board member and chair of the PALS Committee; Sheryl T. Friedrichs, Paul A. Kohut, Dr. Al Mooney, Barbara Scarboro, and Fred J. Williams serve as expert board members.

LAP Board Meetings Scheduled For 2007

The LAP Board meets quarterly during the time of the council meetings except in the fall, when the LAP Board meets if necessary, at the time of the annual PALS training meeting.

LAP Board meetings are usually scheduled for lunchtime on the Thursday of the week the council meets. The schedule for the council is listed below:

January 16-19, 2007
Sheraton Capital Center, Raleigh
April 17-20, 2007
Sheraton Capital Center, Raleigh
July 17-20, 2007
Date Not Confirmed, Site TBD
October 16-19, 2007
Sheraton Capital Center, Raleigh ■

Legal Specialization (cont.)

allows us to show the consumer that we are knowledgeable and dedicated to the practice of bankruptcy law.

Q: How does specialization benefit the public?

The more the public becomes aware of the certification program, the more it will help steer them toward lawyers who have proved themselves. Consumers suffer when an attorney doesn't know how to handle an issue.

Q: How do you see the future of specialization?

I am glad to hear about the new arrangement with the American Board of Certification (see sidebar). That should make it easier for lawyers to take the exam and then not have to take another exam. This agreement puts North Carolina bankruptcy lawyers on the national list and into a wider prominence. Hopefully more bankruptcy lawyers will take the exam in the next few years as the laws are more established.

Q: What would you say to encourage other lawyers to pursue certification?

If you're serious about being a bankruptcy lawyer and committing the time to learn the law, this is an excellent way to prove to yourself and the legal community that you are knowledgeable and dedicated to this type of work. ■

The North Carolina State Bar Board of Legal Specialization recently launched an alliance with The American Board of Certification (ABC) to allow qualifying lawyers to take one examination in seeking certification by both organizations. For more information please visit our website at:

nclawspecialists.org/bec_bankruptcy.asp

State Bar Outlook (cont.)

impost was illegal and unenforceable, at least by suspension of their law licenses. As was noted above, the proceedings before the Administrative Committee have been continued until the committee reconvenes early next year. It is unclear what the committee will ultimately decide. I very much doubt that it will undertake to address the respondents' constitutional arguments. The courts are much better situated to handle such questions and we can fairly presume, in our forum at least, that the statute is valid. The more interesting issue is whether the State Bar can, under the law as written, suspend the law licenses of those who refuse to pay. The statute is not explicit as to whether payment of the surcharge is a condition of membership. In order to reach that conclusion, it is necessary to find that the surcharge is synonymous with the annual membership fee. To reach any other conclusion is to suppose that the legislature did not actually intend for the obligation to be enforceable. I think that's unlikely and am inclined to believe that failure to pay the surcharge is indeed grounds for suspension.[3] In any event, the council will make a ruling of some sort in January. Like Neville Chamberlain, I'm hopeful that the decision, whatever it happens to be, will end aggression and prove to be the basis of "peace in our time." ■

Endnotes

1. The origins of the word "surcharge" are somewhat murky. Etymologists think that it might have reference to the medieval sport of jousting. Beginning in the thirteenth century, fighting men in England known as "knights" or "surknights" or, simply, "surs," would occasionally hold martial competitions in which champions from all the various counties would vie for damsels. These "all-county competitions" or "ACC Tournaments" were very popular and tickets were hard to come by. Ultimately, they could only be obtained by bribing the valets who took care of the horses and boosted the heavily armored combatants onto their steeds. Persons who made such contributions were said to belong to "booster clubs." Tournaments were generally held early in the morning in dewy meadows, sometimes referred to as "dews." The actual jousting involved pairs of knights who would charge toward one another on opposite sides of a waist high barrier or "bar" with lances and attempt to unseat each other. Often the loser, who was said to have been "surcharged," was knocked senseless and found himself suspended by the bar over the dews.
2. The State Bar, as was mentioned earlier in this article, took no position regarding the bill that originally embodied the surcharge, and takes no position now as to whether the assessment makes sense as a matter of policy. It does seem worth mentioning, however, that the slope may be slippery. If lawyers can be taxed to finance judicial campaigns, can they also be made to pay for judicial retirement benefits, new courthouses, or other things relating to the administration of justice that have customarily been financed by the citizenry as a whole?
3. Of course, the legislature may make all this academic by clarifying matters when it reconvenes next year.

February 2007 Bar Exam Applicants

The February 2007 Bar Examination will be held in Raleigh on February 27 and 28, 2007. Published below are the names of the applicants whose applications were received on or before October 20, 2006. Members are requested to examine it and notify the board in a signed letter of any information which might influence the board in considering the general fitness of any applicant for admission. Correspondence should be directed to Fred P. Parker III, Executive Director, Board of Law Examiners, PO Box 2946, Raleigh, NC 27602.

Bahiyyah Khaleelah Abdul-Wakil
Durham, NC
Kellie N. Adesina
Charlotte, NC
Omogbonjubola Akintola
St. Louis, MO
Suzana Stoffel Martins Albano
Morrisville, NC
Shannon Rae Aldous
Boone, NC
Jeffrey W. Aldrich Jr.
Charlotte, NC
Brian G. Alexander
Cary, NC
Patrick Michael Jamison Allen
Charlotte, NC
Peter Griffith Allen
Charlotte, NC
Utaukwa Brown Allen
San Francisco, CA
Virginia Vaughan Allen
Greensboro, NC
Vickie Allison-Spencer
Greensboro, NC
Ashley Elizabeth Ameika
Greensboro, NC
Cara Capponi Amo
Charlotte, NC
Jodi Rene Anderson
Charlotte, NC
Kitrina Joy Anderson
Columbia, SC
Susan V. Anderson
Wrightsville Beach, NC
Owen Boyd Asplundh
Raleigh, NC
Janan Ileen Assaf
Irvine, CA
Mark Alfred Aufdenkampe
Brevard, NC
Tasha Dene' Auton
Conover, NC
Thomas L. Avery III
Indian Trail, NC
Brian Breslin Axelroth
Charlotte, NC
William Hugh Bailey
Raleigh, NC
Katherine Mary Desiree Baird
Fort Mill, SC
Jennifer M. Ball
Raleigh, NC
Shelly Maxwell Bao
Wilmington, NC
Dawn Barker
Concord, NC
Jeannie Pino Barrow
Henderson, NC
Candace L. Bates
Mobile, AL
Amanda Marie Baxley
Raleigh, NC
Joseph Robert Baznik
Darien, IL
Judith Marie Beall
Charlotte, NC
Brian Thomas Bellavia
Orlando, FL
Oshrat BenMoshe-Doriocourt
Durham, NC
Allison Langford Bennett
Winston-Salem, NC
Raymond Michael Bennett
Raleigh, NC
Richard Bethencourt
Morrisville, NC
Pavana Banari Bhat
Cameron, NC
Nishant Bhatnagar
South Portland, ME
Marjorie Griffin Blaney
Matthews, NC
Jacquelyn Teresa Bock
Fort Mill, SC
Dan Wilson Bolton III
Reno, NV
Gary James Bowers
Thomasville, NC
Stephanie C. Bowes
Mebane, NC
Katie M. Bowles
Raleigh, NC
Lauren Bowman
Miami, FL
Montrale D. Boykin
Durham, NC
Gary Michael Brandenburg
North Palm Beach, FL
Justin Hart Brandon
Alexandria, VA
Sondra D. Broughton-Cozart
Durham, NC
Brenton Earl Golden Brown
Charlotte, NC 28210, NC
Ryan Aren Brown
Lenoir, NC
Cristina Rose Buffington
Wilmington, NC
Megan S. Buis
Hubert, NC
Rex Burford
Wilmington, NC
Veronica Michele Burianek
Palm Harbor, FL
Keely M. Burrell
Greenville, SC
David L. Bury Jr.
Greensboro, NC
Katherine Bushueff
Charlotte, NC
Beverly Jeanette Byrum
Waxhaw, NC
Jason P. Caccamo
Centreville, VA
Enzo F. Cannizzo
Staten Island, NY
David August Capasso
Durham, NC
Vernon Elliott Cardwell Jr.
Greensboro, NC
Oliver Carter III
Raleigh, NC
Neil Alan Cawlfield
Hendersonville, NC
Tina Marie Cecil
Raleigh, NC
Robert Gordon Chambers
Charlotte, NC
James Bradford Champion
Denver, NC
Josephine Ying Pui Chan
Hong Kong, ZZ
Judy Chang
Los Angeles, CA
Michael Weiland Chen
Woodbridge, VA
Nalina Victor Chinnasami
High Point, NC
Jinwook Choi
Buford, GA
Lorri Maria Clark
Fort Lauderdale, FL
Monica Renee Cloud
Raleigh, NC
Lori Crawford Cole
Raleigh, NC
Susan Williams Cope
Stem, NC
Peter Corbitt
Cardiff, CA
David J. Cortes
Cary, NC
Phillip Haskell Cowan
Raleigh, NC
Colby Morgan Crabb
Jackson, MS
David Prince Creekman
Raleigh, NC
Kathryn Batton Crews
Greensboro, NC
Dixie Lee Cristea
Cary, NC
Kevin Lamont Crosby
Washington, DC
Andrew G. Croshaw
Charlotte, NC
Jean M. Croughan
Stuart, FL
Julie A. Cummins
Clinton, MA
Cheryl V. Cunningham
High Point, NC
Charles Jeffreys Cushman
New Bern, NC
DeLisa Levette Daniels
Greensboro, NC
Alicia Beth Davis
Charlotte, NC
Erin Cassell Davis
Durham, NC
Zandra Zelada Davis
Spring Lake, NC
Shani Davis-Harrison
Raleigh, NC
Darren Orville Day
Greenville, NC
Jose' Gladstone Dees
Brandywine, MD
Rose Mary Staples Deese
Charlotte, NC
Brien Rose Devine
Wilmington, NC
Torrey Donell Dixon
Durham, NC
Kenneth G. Dodelin
Chapel Hill, NC
Jennifer K. Donaldson
Elizabeth City, NC
Manisha R. Dorawala
Charlotte, NC
Stephanie Brooke Douglas
Jacksonville Beach, FL
Holly Elizabeth Dowd
Union, SC
Kimberly Ann Doyle
Clayton, NC
Catherine Rosalie Drago
Charlotte, NC
Courtney Michelle Duncil
Charlotte, NC
Walter George Dusky
Fort Mill, SC
Markus Daniel Ebert
Charlotte, NC
Todd Edward Elbert
Greensboro, NC
Sandra Kay Pfau Englund
Shiloh, NC
Jennifer Lynn Epperson
Raleigh, NC
Matthew A. Epstein
Cincinnati, OH
Joseph John Estwanik IV
Charlotte, NC
Brandon Lee Evans
Durham, NC
Tamisha Idella Evans
Greensboro, NC
Henry Lee Falls III
Charlotte, NC
Thomas Walker Farrell
Orlando, FL
Ann Marie Ferrari
Chapel Hill, NC
Stephanie A. Fierro
Charlotte, NC
Joyce Wynne Fischer
Kittrell, NC
Ethan John Fleischer
Raleigh, NC
Steven B. Forsythe
Charlotte, NC
Debra-Lynn Fowler
Raleigh, NC
Hanna Moria Frost
New Smyrna Beach, FL
Clelia Amari Fry
Holly Springs, NC
Jamie Tomhave Gallimore
Washington, DC
Ariel Orlando Garcia
Tampa, FL
Melba Lisa Garcia
Lawton, MI
Angela W. Garcia-Lamarca
Durham, NC
Erica Parham Garner
Clayton, NC
Mary Anne Garvey
Winston-Salem, NC
Christopher Patrick Gelwicks
Charlotte, NC
Susan Lorraine Giles
Baltimore, MD
Lori Elizabeth Gilmore
Monroe, NC
Julie Helene Glanzer
Morehead City, NC
Barbara R. Goldberg
Raleigh, NC
Michele Ann Goldman
Raleigh, NC
Alexander John Gomes
Asheville, NC
Stephanie Gootnick
Raleigh, NC
Blair Patrick Graham
Durham, NC
Frank Richard Graham Jr.
Cornelius, NC
James Michael Chironex Green
Raleigh, NC
LaCusia RaShae Green
Wake Forest, NC

Scott William Grupp
Chapel Hill, NC
Agatha Brooke Guy
Waynesville, NC
Roberto Guzman
Morrisville, NC
Emanuel Creft Haggins III
Winterville, NC
Julie Denise Hall
Hillsborough, NC
Patrick DePaul Hannah
Durham, NC
Erin A. Harrigan
Cary, NC
Amber Michelle Haskell
Maysville, KY
Harry W. Haskins
Sarasota, FL
Stephen James Hawes IV
Alexandria, VA
Amber Ivie Hayles
Cary, NC
Daniel Anthony Heath
Charlotte, NC
Kristen Waldman Heath
Wilmington, NC
Koury L. Hicks
Albuquerque, NM
Bess S. Hilliard
Raleigh, NC
Christopher M. Hinsley
Charlotte, NC
Shannon Elizabeth Hoff
Charlotte, NC
Patricia Maggio Homa
Hampstead, NC
Jonathan Ashley Hornbuckle
Cherokee, NC
Harry R. Hoston
Lauderdale Lakes, FL
Pearlynn Gilleece Houck
Charlotte, NC
Andrew Thomas Houston
Charlotte, NC
Carly Elizabeth Howard
Charlotte, NC
Aprilia Elizabeth Hubbard
Salisbury, NC
Michaela Skvara Hudson
Raleigh, NC
Allen Richard Hunt
Greensboro, NC
Catherine Virginia McCarth Hutasuhut
Charlotte, NC
Stuart Innes
Barco, NC
Jill L. Isaacs
Apex, NC
Michele Janette Garrett Jacobs
Knightdale, NC
Sumit Kumar Jain
Raleigh, NC
Chester C. Jeng
Raleigh, NC
Edward J. Jennings
Ft. Lauderdale, FL
Kwangchul Ji
Seodaemun-ku Seoul, ZZ
Archie Johnson
Conway, SC
Ashley Elizabeth Johnson
Cary, NC
Jessica Monique Johnson
Morrisville, NC
Arin Briana Jones
Morrisville, NC
Cheryl M. Samuel Jones
Charlotte, NC
Maria Rochelle Jones
Suffolk, VA
Chequela Shonette Jordan
Charlotte, NC
Elizabeth Dana Kalua
Fayetteville, NC
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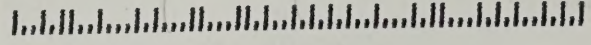

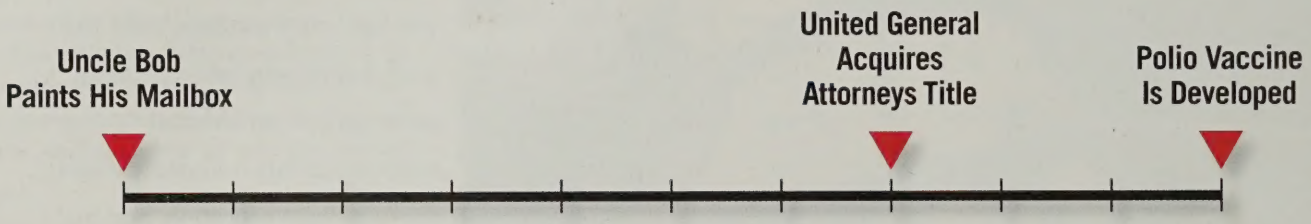

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